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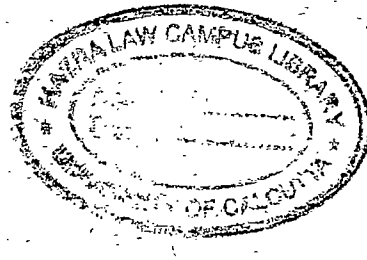
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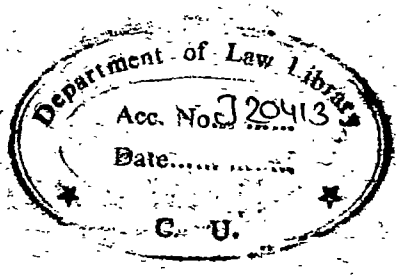
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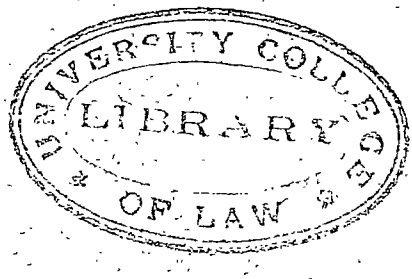
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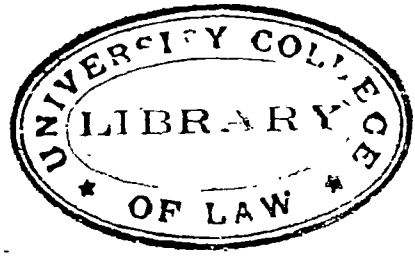
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CONTRIBUTORS OF ARTICLES

		PAGE
ALIBERT, RAPHAEL	The French Conseil D'Etat	257
CHORLEY, R. S. T.	Dr. Edward Jenks	215
CHORLEY, R. S. T.	Liberal Trends in Present-Day Commercial Law	272
FORREST, G. A.	Desertion as a Matrimonial Offence	195
FRIEDMANN, W.	International Law and the Present War	177
GOWER, L. C. B.	Building Societies and Pooling Agreements	33
KAHN-FREUND, O.	The Report of the Transport Advisory Council and the Square Deal Dispute	136
LAUTERPACHT, H.	Recognition of Insurgents as a *De Facto* Government	1
LEWIN, JULIUS	Some Legal Consequences of Marriage by Native Christians in British Africa	48
MANN, F. A.	Exchange Restrictions in England	202
RADZINOWICZ, LEON	The Evolution of the Modern English Prison System	121
SCHWARZENBERGER, G.	The Bank for International Settlements and the Czech Gold Assets held by the Bank of England	150
WALKER, GILBERT	Road Transport—Economics and the Law	21
WINDER, W. H. D.	Undue Influence and Coercion	97



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THE
MODERN LAW REVIEW

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RECOGNITION OF INSURGENTS AS A *DE FACTO* GOVERNMENT

I

THE Spanish Civil War of 1936–1939 gave occasion for a series of important decisions of English Courts on matters of interest for international law.[1] These decisions were given at a period when breaches of international law on a wide scale were being committed by some States and tolerated by others in what was assumed to be the general interest of peace. Settlement of current disputes by reference to international law had receded into the background. It thus happened that the part of municipal tribunals in scrupulously upholding the principles of international law, in so far as they were applicable, acquired particular significance. The task with which they were confronted was rendered specially difficult owing to a wide discrepancy which the nature of events established in many respects between the conspicuous facts of the civil war and the international legal situation. In the first instance, while there were present most of the requirements imposing upon third States the duty to recognise a status of belligerency, Great Britain and other countries were prevented from granting belligerent rights owing to the circumstance that the struggle had ceased from its

[1] See in particular *The Cristina*, [1938] A.C. 485; [1938] 1 All E.R. 719; *Banco de Bilbao* v. *Rey*, [1938] 2 K.B. 176; [1938] 2 All E.R. 253; and *The Arantzazu Mendi*, discussed below. For a discussion of some aspects of these cases see Jennings in *Modern Law Review*, ii (1939), pp. 287–291.

very commencement to be a civil war in the established sense of the term. The result was that the rebellious forces, while denied the exercise of belligerent rights on the high seas, were in other respects treated as a community engaged in lawful warfare. They acquired the status of insurgency and in that capacity their freedom of action was given a wide and generous interpretation. Secondly, until February, 1939, the insurgent authorities, although exercising effective authority over the major part of Spanish territory, were not recognised as a government for the reason that to do so would have amounted to premature recognition in breach of international law. Yet the fact of the actual exercise of power could not properly be ignored. The result, fully authorised by international law, was a measure of *de facto* recognition of substantial scope.

Thus in both matters—recognition of belligerency and recognition as a government—there was created a position in which Great Britain, acting in conformity with international law, found herself compelled to disregard what some conceived to be the realities of the situation and to adopt the intermediate legal institutions of recognition of insurgency (as distinguished from recognition of belligerency) and of *de facto* recognition. Neither of these had previously acquired any degree of precision. It is probable that, designed as they are to meet factual situations which, for one reason or another, cannot be defined in the typical terms of recognition of belligerency and *de jure* recognition of a government, neither of these institutions admits of precision or finality. This being so, it is of considerable jurisprudential interest to examine the attitude of English Courts on these matters at a time when the realities of the law were confronted with actualities which defiantly challenged its authority. It is proposed to examine these questions by reference to what is perhaps the most significant case decided by English Courts during the Spanish Civil War, namely, *The Arantzazu Mendi*[2]—a case which raises questions of significance not only as to recognition of insurgents as a government but also as to certain important aspects of the judicial function in the matter of interpretation of international law.

The Arantzazu Mendi was registered at Bilbao. She had left Spain before May, 1937. In June, 1937, Bilbao was captured by the insurgent forces. On 23rd March, 1938, the owners of the ship were served in London with a notice of requisition on the

[2] [1938] 3 All E.R. 333 (Judgment of Mr. Justice Bucknill); [1938] 4 All E.R. 267 (Judgment of the Court of Appeal: Slesser, Finlay and Goddard, L.JJ.); [1939] 1 All E.R. 719 (Judgment of the House of Lords: Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright).

part of the Republican Government under a decree of requisition of 28th June, 1937; on 5th April, 1938, the accredited sub-agent of the insurgent Nationalist Government in London served on the owners a notice of requisition under a decree issued on 2nd March, 1938. On 13th April the managing director of the owners' firm declared that he freely submitted to the provisions of the Nationalist decree of 2nd March. On the same day the Republican Government issued a writ asking for possession of the ship to be adjudged to them. The Nationalist Government appeared conditionally under protest and moved that the writ be set aside on the ground that it impleaded a foreign State, namely, the Nationalist State which was in possession of the ship by its duly authorised agents. Mr. Justice Bucknill in an interim judgment held that the Nationalist Government was in possession of the ship. On the question whether that Government was the government of a foreign sovereign State his Lordship sought the usual information in a letter of the Foreign Office. The answer received was as follows—

> "(1) His Majesty's Government recognises Spain as a foreign sovereign state. (2) His Majesty's Government recognises the government of the Spanish Republic now having its seat in Barcelona as the *de jure* government of Spain. (3) No government other than that referred to in the preceding subparagraph is recognised by His Majesty's Government as the *de jure* government of Spain or any part thereof. (4) The Nationalist Government of Spain is a government in conflict with the government of the Spanish Republic established at Barcelona. It claims to be the government of Spain and is seeking to overthrow the government of the Spanish Republic and to establish its authority over the whole of Spain. (5) His Majesty's Government recognises the Nationalist Government as a government which at present exercises *de facto* administrative control over all the Basque provinces of Spain. (7) His Majesty's Government has not accorded any other recognition to the Nationalist Government. (8) The Nationalist Government is not a government subordinate to any other government in Spain."

In reliance upon this letter Mr. Justice Bucknill held[3] that the Nationalist Government was for the purposes of this case a government of a foreign sovereign State and that the writ must be set aside seeing that it tended to implead the government of a foreign sovereign State. The Court of Appeal unanimously upheld the decision of the trial judge on both points—that of

[3] [1938] 3 All E.R. 333.

the status of the Nationalist Government as the government of a foreign sovereign State and that of its being in possession of the ship. The House of Lords unanimously confirmed the decision of the Court of Appeal.

At the time of the judgment the Nationalist authority in Spain had not been recognised as a belligerent. It was an insurgent government. The condition of insurgency in international law is one of considerable elasticity. It is a factual relation in the meaning that legal rights and duties as between insurgents and third States exist only in so far as they are expressly conceded and agreed upon for reasons of convenience, of humanity, or of economic interests. Great Britain had maintained official intercourse with the Nationalist authorities for the protection of British subjects, for safeguarding commercial interests, and for securing a relaxation of severity in the conduct of war by appeals of various kinds and offers of good offices in the exchange of prisoners and in similar matters. Agents had been mutually appointed for these purposes. They had been granted certain privileges calculated to facilitate the execution of their duties, but were denied the diplomatic immunities enjoyed by representatives of sovereign States.[4] At the time when these arrangements were made the British Government repeatedly denied that there was an intention to recognise the sovereignty of the insurgent authority.[5] The position had not changed at the time

[4] Answering a question in the House of Commons on April 4, 1938, concerning a letter sent to a local authority and referring to the "Spanish Nationalist Government," the Under-Secretary of State for Foreign Affairs said:

"The use of the phrase 'Spanish Nationalist Government' in this letter, which was in fact only of a semi-official character, implies no sort of modification of the attitude of his Majesty's Government in regard to the recognition of General Franco's administration. Under the agreement made with the latter for the exchange of agents, diplomatic status was not to be claimed for them, and no such claim has in fact been made or conceded by either party to the agreement. It was, however, felt desirable to secure for the British Agent and his staff certain privileges of a kind which are commonly enjoyed by diplomatic officials in order to facilitate the discharge of their duties. It was thus found necessary to concede corresponding privileges such as the one in question to General Franco's Agent and his staff. Such concessions made by either side involve no admission that the recipients possess diplomatic status, in proof of which it should be sufficient to say that certain reliefs which could be granted only on the basis of such status are withheld from the Duke of Alba and his staff, and the privileges accorded to them are of a limited character": House of Commons Debates, vol. 334, col. 5.

[5] On 8th November, 1937, the Secretary of State for Foreign Affairs stated that "the reception of such an agent in London will not in any way constitute recognition by His Majesty's Government of the authorities of the territories under the control of General Franco, . . ." He added that "neither party will accord or expect to receive diplomatic status for their agents" (House of Commons, vol. 328, cols. 1125, 1126). On 22nd November, the attention of the Secretary of State for Foreign Affairs was called to an official communique issued by General Franco's headquarters claiming that the conclusion of the agreement concerning agents implied recognition of the sovereignty of the Franco administration. In reply the Secretary of State for Foreign Affairs stated that he was

when the judgment of the Court of Appeal was given. This being so, the decisions of the Court of Appeal and of the House of Lords laying down that the insurgent government was the government of a foreign sovereign State seem to go so far beyond the declared intentions of the British Government as well as beyond what international lawyers associate with a status of insurgency or with recognition of a government during a civil war that, but for the information received from the Foreign Office, it might have been difficult to follow the judgments in question. Actually, they did not purport to go beyond an interpretation, in the light of established principles, of the communication from the Foreign Office. The question is whether the nature and degree of recognition as stated in the answer of the Foreign Office irresistibly led to the conclusion arrived at by the courts.

II

The principle that in questions relating to the status of foreign States and governments courts rely on the information received from the Executive is a well-established rule of judicial practice. But that principle does not relieve the courts of the substantial duty both of interpreting the answer of the Executive and of drawing from it the appropriate legal consequences. Thus on questions of recognition courts must, in the first instance, interpret the statement of the Executive in order to determine what degree of recognition has been granted. For on this point the communication may be—and often is—obscure or ambiguous. Moreover, once the task of interpretation has been accomplished, the courts are called upon to determine the legal consequences of such degree of recognition as may have been given. With regard to either, their function must be guided by the consideration that in matters involving the international relations of this country results must be avoided which are inconsistent with its international obligations. In particular, with regard to the communication from the Foreign Office it is incumbent upon courts, if only possible, to interpret it so as not to impute to the Crown the intention to disregard international law. This is a rule which is generally regarded as applicable to the interpretation of statutes.[6] It must be applied *a fortiori* to the interpretation of

"unable to find any phrase therein which might be interpreted as claiming that the agreement implies recognition of sovereignty." He then agreed that His Majesty's Government "do not accept any suggestion of that kind" (*ibid.*, vol. 329, col. 834).

[6] *Mortensen* v. *Peters*, [1906] Sc.L.T. 227. See also *Croft* v. *Dunphy* (1933), 1 D.L.R. 225; [1933] A.C. 156; Cockburn, C. J., in *Queen* v. *Keyn*, 7 Ex.D. 63, 210; Marshall, C.J., in *The Charming Betsey*, 2 Cr. 64, 118.

the pronouncements of a department of the Executive which is specially concerned with the international relations of this country. In *The Arantzazu Mendi* the answer of the Foreign Office did not pretend to constitute a clear exposition of the situation. But the Secretary of State was explicit on one point, namely, that His Majesty's Government had not accorded to the Nationalist Government any recognition other than that deducible from the terms of the letter—an expression of caution which would have had little meaning if recognition identical with that of a foreign sovereign State had been intended.

This being so, it is not inappropriate to enquire what was the kind of recognition which His Majesty's Government could not, consistently with their international obligations, have intended to grant. It is proper to ascertain what manner of recognition would be so inconsistent with international law as to impose upon the Court the duty to do its utmost in order to avoid the necessity of attributing to the Crown the will to set aside the applicable rules of international law. It would have been fitting to attempt to interpret the letter from the Foreign Office by enquiring what were the rules of international law in the matter of recognition of insurgent governments *durante bello*.

This particular question is not an unduly difficult one. For while some problems of recognition of States, governments, and belligerency are controversial—for instance, whether recognition is constitutive or declaratory or whether it is a diplomatic or a legal function—there are some which are readily and generally acknowledged. Thus it is universally admitted that in the case of a civil war or a war of secession it is contrary to international law to grant to the insurgent community full recognition as a government or a State. So long as the issue has not been definitely decided in favour of the rebellious party, recognition is premature and unlawful. As Hall says: "Until independence is so consummated that it may reasonably be expected to be permanent, insurgents remain legally subject to the state from which they are trying to separate. Premature recognition therefore is a wrong done to the parent state; in effect indeed it amounts to an act of intervention."[7] Sir William Harcourt in his *Letters by Historicus on Some Questions of International Law* (1863) put the matter even more clearly. He says—

> "While the issue can be still considered in any degree *in ambiguo*, the presumption is necessarily in favour of the former Sovereign. And a friendly State is bound to exact very conclusive and indisputable evidence that the sovereignty of a government with which it has existing relations over any part of its former dominions has been

[7] *International Law* (8th ed., 1924), s. 26, p. 105.

finally and permanently divested. It is not at liberty during the pendency of an actual struggle to speculate on the result, or to assume the probability of the ultimate failure of the ancient Sovereign, however plausible may be the grounds for such an inference. What the claimant to recognition has to show is an accomplished and *de facto*, not a probable or *paulo post futurum*, independence. This I believe to be the accurate rule of international law, . . ."[8]

These quotations refer to the recognition of insurgents attempting a secession from the existing State, but the position is identical in the case of rebellions aiming at setting up an alternative government seeing that the recognition of the insurgents as a sovereign State results in the separation of the State in question into two units. There is, for instance, little doubt that if in the course of the American Civil War Great Britain had recognised without qualification the Confederate States as the government of the part of the United States under their control in such a manner as to oblige the courts to treat it as a foreign sovereign State, such recognition would legally have been a wrong committed against the lawful government and politically a cause for war with it.

Recognition pure and simple of the Spanish insurgent government as a government of Spain or even as a government of a part of Spain, at the time when these cases were decided, would not have been in conformity with an established principle of international law. It might conceivably have been open to the British Government to form the view that the established rule of international law was too rigid and that it was no longer possible to adhere to it in the unprecedented conditions of the Spanish Civil War, but nothing short of a very clearly expressed determination to effect a change of that nature could properly be regarded as sufficient. No such determination appeared in the letter of the Foreign Office in *The Arantzazu Mendi*. On the contrary, there was a clear expression of intention to grant a limited recognition only, as distinguished from full recognition *de jure*—"His Majesty's Government has not accorded any other recognition to the Nationalist Government." The recognition granted was to "a government which at present exercises *de facto* administrative control" over the larger portion of Spain. It did not partake of the formality of the *de facto* recognition such as, for instance, was accorded to Soviet Russia in 1921.[9] But assuming that the intention was to grant full "*de facto*" recognition, the question arises: Is such recognition indistinguishable

[8] P. 7. See also Moore, *Digest*, Vol. I (1906), p. 73. There is on this question practical unanimity among international lawyers.

[9] In the letter of the Foreign Office in *Luther* v. *Sagor* it was stated that "His Majesty's Government recognise the Soviet Government as the *de facto* Government of Russia."

in its legal results from full *de jure* recognition? If so, was the caveat in the statement of the Foreign Office without any ascertainable significance? If so, has the prohibition of premature recognition ceased to be a rule of international law?

III

The decision of the Court of Appeal in *Luther* v. *Sagor*[10]—a much overworked case—created among many, including writers of distinction, the impression that there is "a diplomatic distinction between recognition *de jure* and recognition *de facto*, but [that] there is no legal difference between these two forms."[11] Actually, the decision in that case went no further than to lay down that there is no difference between *de facto* and *de jure* recognition for the purpose of acknowledging the validity of the legislative or executive acts of the government recognised *de facto*. It was to that extent—and no further—that the Court of Appeal relied upon *Luther* v. *Sagor* in its decision in *Banco de Bilbao* v. *Rey*.[12] In that case the Court held that, in view of the *de facto* recognition of the insurgent authorities by the British Government, it was bound to treat as valid the decrees of the Spanish Nationalist authorities in the territory under their control while treating as a mere nullity the decrees of the Republican Government in respect of that territory. The communication of the Foreign Office in that case approximated closely to that in *The Arantzazu Mendi* except that it was stated in the crucial passage that "His Majesty's Government recognised the Government of General Franco as an *insurgent* Government exercising *de facto* control over a considerable portion of Spain." It may be a matter of dispute how far the qualification of the recognised authority as an "insurgent" Government was intended to reduce the import of the recognition; similarly, it may be a matter of discussion how far the principle of *Luther* v. *Sagor*, originally applied to an authority in unrivalled possession of the entire territory of the State, can be applied without modification to the case of an insurgent administration in the course of a civil war waged against a Government enjoying recognition *de jure*. But apart from the not unnecessary warning against using the decision in *Luther* v. *Sagor* as covering all possible aspects of *de facto* recognition,[13] there are weighty reasons of convenience and common sense which render acceptable the true principle of

[10] [1921] 3 K.B. 532.
[11] Brierly, *The Law of Nations* (2nd ed., 1935), p. 110.
[12] [1938] 2 K.B. 176; [1938] 2 All E.R. 253.
[13] See below, p. 19, as to *The Gagara*.

Luther v. *Sagor* as followed in *Banco de Bilbao* v. *Rey*—the principle, that is to say, that recognition *de facto* carries with it the acknowledgment of the validity of the acts of the recognised authority within its territory. It is not inconsistent with the legitimate interests of the lawful Government that third States should be in a position to maintain some intercourse with the insurgent administration without treating the insurgents as a sovereign State in the international arena. Recognition *de facto* serves that very purpose. A rule of law which compels third States to regard as invalid, for a prolonged period of time, the laws and administration of a *de facto* authority and to regard as valid within the territory of that authority the laws and administration of the *de jure* government, is not one which commends itself to sound principle (unless, perhaps, in a particular case the *de facto* authority is established in violation not only of the constitutional law of the State concerned but also of international law[14]). A State cannot be called upon to disregard persistently facts which are not in themselves contrary to the law. Revolutions and rebellions are not contrary to international law. For this reason the rule of international law prohibiting premature recognition of governments pending the civil struggle applies only to recognition *de jure*, but not to recognition *de facto* as interpreted in *Banco de Bilbao* v. *Rey*. This means that international law permits such a measure of recognition as is necessary for the acknowledgment of the validity of the acts of the *de facto* authority within its territory. But the permission does not go to the length of denying its own premises by making recognition *de facto* extend to all purposes, i.e. by assimilating it to full recognition *de jure*. It does not go to the length of permitting the treatment of the *de facto* authority as a foreign sovereign State for all purposes.

The circumstance that international law permits recognition *de facto* but not *de jure* means that there is a substantial difference between these two kinds of recognition; it means that recognition *de facto* goes so far and no farther. But a hasty reading of *Luther* v. *Sagor* is apt to conduce to the facile generalisation that the

[14] This latter consideration might conceivably have been adduced as justifying any criticism of the decision in *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* ([1937] Ch. 513). In that case the principle of *Luther* v. *Sagor* was applied to the internal effects of a decree of the Italian *de facto* Government, recognised as such by His Majesty's Government, putting into liquidation the Bank of Ethiopia. It might have been argued that as the *de facto* recognition was accomplished in violation of international law courts could not attach to it any legal effects whatsoever. Probably the accurate answer to that line of reasoning is that the grant of *de facto* recognition—a function which is within the province of the Government and not of the courts—validated the effects of the illegal act to the extent covered by the *de facto* recognition.

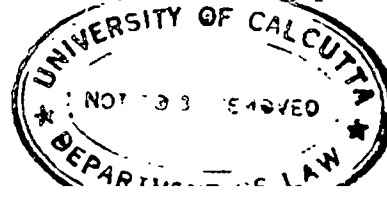
distinction between these two kinds of recognition is a mere formality so far as the Courts are concerned. This seems to have been the view of the learned judge in *Bank of Ethiopia* v. *Bank of Egypt*, who said in a passage which, it is submitted, was unnecessary for the decision:

> "The recognition of the fugitive Emperor as a *de jure* Monarch, appears to me to mean nothing but this, that while the recognised *de facto* Government must for all purposes, while continuing to occupy its *de facto* position, be treated as a duly recognised foreign Sovereign State, His Majesty's Government recognises that the *de jure* Monarch has some right (not in fact at the moment enforceable) to reclaim the Governmental control of which he has in fact been deprived. Where, however, His Majesty's Government has recognised a *de facto* Government, there is, as it appears to me, no ground for suggesting that the *de jure* Monarch's theoretical rights (for *ex-hypothesi* he has no practical power of enforcing them) can be taken into account in any way in any of His Majesty's Courts."

It would have been sufficient for the purposes of the case to hold that as the British Government regarded the Italian Government as the government *de facto* of the parts of Ethiopia which they controlled the Court was bound, on the analogy of *Luther* v. *Sagor*, to recognise as valid the decree of the Italian authority placing the Bank of Ethiopia in liquidation. But there was no warrant for suggesting that the *de facto* authority was to be treated for *all* purposes as a duly recognised foreign sovereign State. In fact, in the Foreign Office certificate which was laid before the Court in that case it was stated that an Envoy Extraordinary and Minister Plenipotentiary for the Emperor of Ethiopia had been received at the Court of St. James and that he continued to be accorded recognition in that capacity.

Neither was the *dictum* of Mr. Justice Clauson acceptable in so far as it suggested that the *de jure* sovereign had as such no rights enforceable before English Courts. In a case decided a year later, *Haile Selassie* v. *Cable and Wireless Company Limited* (No. 2), it was expressly held that the continued recognition *de jure* of the Emperor of Abyssinia had decisive consequences for the enforcement of the property rights of the Emperor outside Abyssinia. The Court refused to consider as applicable the principle laid down in *United States of America* v. *McRae*[15] that a successful government succeeds to the property of the defeated government. The Court pointed out that in *United States of America* v. *McRae* the question of rival claims of a *de jure* and a *de facto* government was not at issue—a timely reminder that continued *de jure* recognition is not a meaningless fiction. Similarly, the Court refused to follow the easy path of accepting

[15] (1869) L.R. 8 Eq. 69.



the authority of *Luther* v. *Sagor* as covering the point. Mr. Justice Bennett said—

> "I think that the only point established by the decision in that case is that, when the Government of this country has recognised that some foreign Government is *de facto* governing some foreign territory, the law of England will regard the acts of the *de facto* Government in that territory as valid and treat them with all the respect due to the acts of a duly recognised sovereign State. It is clear, I think, that the acts so treated are acts in relation to persons or property in the territory which the authority is recognised as governing in part."[16]

The learned judge attempted, not without some difficulty, to explain the wide statement, quoted above, in Mr. Justice Clauson's judgment in *Bank of Ethiopia* v. *Bank of Egypt*. He suggested that Mr. Justice Clauson was merely concerned to demonstrate that as the plaintiff had no governmental control of any kind in Ethiopia he had no means of enforcing control *there*. Mr. Justice Bennett then referred to *Banco de Bilbao* v. *Rey* as an authority for the limited proposition that recognition *de facto* has legal consequences only with regard to property and acts within the territory under the control of the *de facto* authority. Having thus set a limit to the seemingly uncontrollable influence of *Luther* v. *Sagor*[17] Mr. Justice Bennett held that in view of the continued recognition *de jure* of the Emperor of Ethiopia the plaintiff was entitled to recover a debt which had accrued to him in his capacity as Emperor of Ethiopia before his country had been occupied by the Italian troops. The juridical consequences of the distinction between *de jure* and *de facto* recognition were thus clearly asserted. The relation between the claim of the plaintiff and his continued recognition *de jure* was demonstrated several months later when the case came before the Court of Appeal which, in view of the impending recognition *de jure*, stayed the proceedings until a date after the probable date of recognition in order to prevent unnecessary recourse to judicial process. Subsequently, after recognition *de jure* had been granted in due course and certified in a communication from the Foreign Office, the Court of Appeal held that, in view of that recognition, the situation which obtained at the time when the appeal had been lodged was changed, and that the King of Italy, as the Emperor of Ethiopia, was entitled to the sums claimed by the plaintiff.[18]

[16] (1938) 54 *T.L.R.*, 1087, 1089.

[17] In the first phase of *Haile Selassie* v. *Cable and Wireless Co.* the Court of Appeal (54 T.L.R. 996) reversed the order of Mr. Justice Bennett (54 T.L.R., 628) who, relying, *inter alia*, on *Luther* v. *Sagor*, stayed the proceedings in this case on the ground that the Italian Government made a claim to the sum in question.

[18] [1939] 1 Ch. 182.

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In *The Arantzazu Mendi* the trial judge and the Court of Appeal once more reverted to *Luther* v. *Sagor* as a source of judicial inspiration. They held that an insurgent government recognised as a *de facto* authority was entitled to jurisdictional immunity in England in respect of property situated in England not only in general but also as against the rival claim of the lawful government which His Majesty continued to recognise *de jure*. No reference was made, on this matter, to Mr. Justice Bennett's judgment in the case referred to above. The Court of Appeal in *The Arantzazu Mendi* was, of course, free to overrule the decision in *Haile Selassie* v. *Cable and Wireless Co.* (No. 2), but it may perhaps be doubted whether the proper course was to disregard that decision altogether. The decision in *The Arantzazu Mendi* raises issues wider than the matter which was immediately before the Court and it is therefore permissible to scrutinise it in some detail. In none of the judgments was there an attempt to solve a problem which, on the face of it, was one pertaining to the international relations of the Crown, from the point of view of the question whether the measure of recognition as assumed by the Court was in accordance with international law and, if it was not, whether it was unavoidable to impute to His Majesty the intention of committing an international wrong by recognising the Nationalist authority as a foreign sovereign State. It would not have been improper to discuss the question whether, if there had been the intention on the part of the Government to grant wide and full recognition as assumed by the Court, it was necessary for the Foreign Office to insist on the *de facto* character of the recognition or on the circumstance that no other recognition than that referred to in the letter of the Foreign Office had been granted.

Undoubtedly, the Court attempted to explain why it was deemed necessary to extend the principle of *Luther* v. *Sagor* to cover the position of the *de facto* authority abroad. However, it is respectfully submitted, the attempt did not go far enough. Thus Slesser, L.J., discussed the suggestion that the principle enunciated in *Luther* v. *Sagor* was limited to the validity of the acts of the *de facto government within its territory,* but he confined himself to quoting extracts from *Luther* v. *Sagor* asserting that the government *de facto* is one which is actually in possession of power while a government *de jure* is one which ought (apparently in law) to possess it. For clearly, it is possible that in the view of the recognising power there follow *some* legal consequences from the fact that the *de jure* government *ought* to possess authority. Otherwise the insistence on the part of the recognising State

on the difference between the two kinds of recognition would be meaningless. In the eyes of international law recognition *de facto* may *for some purposes* be tantamount to recognition *de jure*, but this does not mean that it is so for *all* purposes.[19]

The substantial difference between the recognition of the Soviet Government in *Luther* v. *Sagor* and the recognition of the Nationalist Government in *The Arantzazu Mendi* was not that in the former case the whole territory of Russia was under the control of the recognised authority while this was not so in the case of Spain. The essential distinction was that in the case of the Soviet Government of Russia a measure of recognition which would have amounted to full recognition obliterating the difference between the *de jure* and the *de facto* variety would not have been inconsistent with international law seeing that the civil war was then at an end (the circumstance that the whole Russian territory was under the sway of the Soviet Government was, from this point of view, not immaterial in the sense that it was evidence of the fact that the *de jure* authority had actually ceased to exist). On the other hand, in the case of Spain the *de jure* authority was still a *de facto* power over a considerable portion of Spain, the civil war was raging, and a full measure of recognition assimilating in effect *de facto* and *de jure* recognition would have constituted premature recognition and as such be contrary to international law.

The learned Lord Justice had no hesitation in holding that the recognition of an authority as a *de facto* government pointing to an orderly and organised constitution was a recognition that the authority thus recognised possessed the powers of a State. But it is elementary that there are governments which are not governments of a State in the meaning of international law. There are international conventions which have been signed and ratified by more than a hundred "governments"; but only a portion of these are governments of sovereign States in the meaning attached to the term by international law. The fact that an authority does "possess the powers of a State" does not mean that it is a State in international law with the full prerogatives of statehood attaching to it. It may mean that it possesses sufficient power to make it incumbent upon Courts to

[19] Probably, for this reason the question of recognition of belligerency on which the appellants relied and which was discussed at some length by Slesser, L.J., was not entirely germane to the issue. Even if recognition of belligerency had been granted, such recognition would have amounted to a solemn admission of the fact that a civil war with all its precariousness and uncertainty was raging in Spain—a condition of affairs in which recognition of the insurgent government as the sovereign government of a part of Spain with all the implications of sovereign statehood in international law would constitute a clear departure from the established rules of international law in the matter of premature recognition.

recognise the internal validity of its laws and decrees. There is no potency in the words "government"[20] or "recognition" irrespective of the context in which they are used or of conditions to which they refer.[21] The term "*de facto* government" is often used in international law with reference to a temporarily successful local authority which has risen in opposition to the general government. When English Courts in a number of cases arising out of the American civil war referred to the government of the Confederate States as a "*de facto*" government, they did not intend to refer to it as the government of a sovereign State.[22]

The continued recognition *de jure* of the Republican Government of Spain did not, as rightly pointed out by Lord Justice Goddard, make impossible the recognition of the Nationalist authority as a *de facto* government over a part of Spain. But the question still remained whether such recognition amounted to recognition as a foreign sovereign State, with the full consequences of statehood in international law. There is a difference between saying, as the Foreign Office did, that the Nationalist Government is *de facto* not a government subordinate to any other government in Spain and saying, as the learned Lord Justice did, that the "Nationalist Government had absolute independence of any superior authority." In so far, therefore, as Goddard, L.J., based his judgment on the view that "we are bound by authority to hold that *for all purposes*[23] the consequences [of *de facto* recognition] are the same as they would be if the government were a *de jure* government," it is submitted that probably there is no

[20] Earl Russell, writing to Mr. Adams, Minister of the United States, on 26th November, 1861—at a time when Great Britain refused to recognise the Confederacy as a government of a State—was referring to it throughout as a *de facto* Government. He said: "Her Majesty's Government hold it to be an undoubted principle of international law, that when the persons or the property of the subjects or citizens of a state are injured by a *de facto* government, the state so aggrieved has a right to claim from the *de facto* government redress and reparation" (Moore, *Digest*, vol. I, p. 209).

[21] In *The Charkieh* (4 Adm. & Eccl. 59) the certificate of the Foreign Office affirmed that "he [the Khedive] is recognised by Her Majesty's Government as the hereditary ruler of the province of Egypt under the supremacy of the Sultan of Turkey," but the same certificate stated that "the Khedive has not been and is not now recognised by Her Majesty as reigning sovereign of the state of Egypt." Probably recognition as a hereditary ruler of the province would have been sufficient for acknowledging the validity of the legislative acts done under the authority of the Khedive, while the absence of recognition as a sovereign was deemed a good reason for not granting him immunity from jurisdiction.

[22] Thus we find the Vice-Chancellor saying in *United States* v. *Prioleau* (1865), L.J.Ch. 7: "If the case had been that of a body of mere robbers devastating and plundering the territories of the United States, our courts might have interfered to restore property so acquired; but then the rightful claimants would have been not the United States Government, but the persons who had been robbed. It is only because the money was raised by a *de facto* Government that the United States can come here to claim at all. Had the money been obtained by mere robbery it would have never become public property. It only acquired that character because it was levied by an authority exercising rights of Government."

[23] Italics are the writer's.

authority for any such view. The available authority is to the effect that recognition *de facto* of a revolutionary government has reference only to the internal acts of that government within the territory under its control.

IV

Lord Atkin's judgment in the House of Lords, while fully endorsing the decisions of the Courts below, included a significant modification of Lord Justice Goddard's view of the full identity of *de jure* and *de facto* recognition. He said: "There is ample authority for the proposition that there is no difference for *the present purposes*[23] between a recognition of a state *de facto* as opposed to recognition *de jure*."[24] But otherwise, in addition to holding that the letter of the Foreign Office amounted, for the purposes of international law, to a recognition of the Spanish insurgents as a foreign sovereign State, Lord Atkin did not discuss the issue involved apart from holding that there existed in the present case "all the reasons for immunity which are the basis of the doctrine in international law as incorporated into our law," [25] and that "the non-belligerent state which recognizes two governments, one *de jure* and one *de facto*, will not allow them to transfer their quarrels to the area of the jurisdiction of its municipal courts."[26] Neither did other learned Lords embark upon an analysis of the question with the exception of a short passage in Lord Wright's concurring judgment in which he expressed the view that the "Foreign Office stated the precise facts as then existing in regard to the recognition of His Majesty's Government" and that the contents of the statement of the Foreign Office were not "open to be discussed by the Court on grounds of law."[27]

The judgment of the House of Lords was given at a time when the overwhelming realities of the political and strategic situation would have imparted to a decision denying the full international sovereignty of the insurgent government an appearance of unreality, but it is submitted that an artificiality of this nature may on occasions be of the very essence of the law. In any case, seeing that the judgments were delivered by judges who on former occasions enriched the not insignificant contribution of English Courts to the common stock of international law, a thorough examination by the highest tribunal of the difficult questions involved would have been most welcome. Undoubtedly,

[24] Italics are the writer's. 4 All E.R. 719, at p. 722.
[25] See below, p. 18.
[26] 4 All E.R. 719, at p. 722. And see below, p. 17.
[27] At p. 724.

when the statement of the Foreign Office is clear, it must not be discussed or questioned on legal grounds, but it may be doubted whether in the present case the statement was sufficiently clear or "precise" so as to render unnecessary its interpretation by reference to principles of international law. It was certainly not a communication which suggested at once and with irresistible force that recognition of the government of a sovereign State had been granted.

While in some matters there is no distinction, in the eyes of the Courts, between mere *de facto* and full *de jure* recognition, there exists such a distinction for some purposes. Recognition *de facto* means, *inter alia*, that Courts are bound to treat as lawful the internal acts of the insurgent authority within its territory; it does not mean that that authority must be treated in every other respect like a sovereign State. Thus, as mentioned,[28] the British Government had refused to entertain regular diplomatic relations with the Spanish insurgents or to grant the usual diplomatic immunities to their agents. The *de facto* insurgent government cannot be treated for all purposes as a foreign sovereign State. Once it is so treated the distinction between *de facto* and *de jure* recognition—a distinction to which clearly the Government attached importance and which is of considerable usefulness in international relations—is obliterated; the *de facto* recognition is treated like recognition pure and simple.

There are no impregnable reasons *ab inconvenienti* militating against the view denying to a *de facto* insurgent government the ordinary jurisdictional immunities to which the *de jure* government is entitled. This undoubtedly places the latter in a favoured position in comparison with the former. But the advantage is hardly as far-reaching as may appear at first sight. It is certainly not an advantage which may have the result of interfering appreciably with the maintenance of an attitude of impartiality in relation to a civil war. The denial of the privilege of jurisdictional immunity does not mean the denial of the substantive rights of the government concerned. If that government is in possession of the subject-matter of the action—and *The Arantzazu Mendi* and other authorities show that very nominal possession may on occasions be sufficient—then it is in a position to proceed to prove such title as it possesses, and the mere claim of the *de jure* government will not be regarded as depriving it of that right. It may or may not have difficulty in establishing its title. It may attempt to show, not without considerable prospect of success, that the decrees of the *de jure* government requisitioning

[28] See above, p. 4.

over their property. On the contrary, they have usually accommodated themselves to the consequences of the fact that the extent of jurisdictional immunities of States is by no means well-defined in international law; witness, for instance, the position with regard to the activities of the State in the domain of private law. As to the necessity for reciprocal rights of immunity, these may not improperly be left in abeyance pending the transitional period of the civil war. The same consideration applies to what is probably the principal reason for jurisdictional immunity of States in international law, namely, that the exercise of jurisdiction over a foreign State is inconsistent with its independence and sovereignty.

V

Even if the principles enunciated in *The Arantzazu Mendi* had not been unanimously confirmed by the Court of Appeal and the House of Lords, anything in the nature of emphatic criticism of these decisions would be misplaced seeing that it had been held—and rightly held—in other cases that a recognised *de facto* government is in the same position as a government recognised *de jure* with regard to the validity of its internal legislation and that even in the matter of jurisdictional immunities a *State* recognised *de facto* is in the same position as a State recognised *de jure*.[30] These questions are a matter of degree for the obvious reason that *de facto* recognition is a question of degree and circumstances. But a line must be drawn somewhere—unless we decide to obliterate altogether the distinction, which is firmly embedded in international practice and which is of considerable value, between *de facto* and *de jure* recognition. Reasons have been given for the view that that line must be drawn at a point when an insurgent authority which is recognised as a *de facto* government and which it wou'd be contrary to international law to recognise *de jure* claims jurisdictional immunities as against the government still enjoying *de jure* recognition. This being so, it is convenient to conclude this article by presenting two sets of conclusions—one as laid down in the successive decisions in *The Arantzazu Mendi*; the other, which appears to the writer to be more consistent with the principles of international law and with former decisions of English Courts:

1. *The conclusions in "The Arantzazu Mendi"*: Recognition of a government *de facto* has for the purposes of the jurisdictional

[30] *The Gagara*, [1919] P. 95. This case is perhaps the strongest authority in support of the decision in *The Arantzazu Mendi*. The decisive distinguishing feature is that in *The Gagara* there was no rival *de jure* government opposing the *de facto* authority either generally or in the case before the Court.

immunities of the State or of a part thereof represented by that government the same consequences as recognition *de jure*. These immunities will be accorded also in actions in which the plaintiff is the *de jure* government of the State concerned.

The Arantzazu Mendi is *not* an authority for the view that before English Courts there is no distinction whatsoever between recognition *de facto* and recognition *de jure*.

2. *The writer's submissions*: (*a*) It is an established principle that so long as the civil war lasts the recognition of the insurgents, whether recognised as belligerents or not, as a *de jure* government is contrary to international law.

(*b*) A communication of the Foreign Office relating to the recognition of insurgents must be interpreted in the light of that principle.

(*c*) It is not contrary to international law to recognise the insurgents as a government exercising *de facto* authority over the territory under its control.

(*d*) Such recognition is limited in its effects and cannot properly be assimilated to recognition *de jure*.

(*e*) In particular, while obliging courts to acknowledge the validity of the legislation of the *de facto* insurgent authority within its territory, it does not transform the authority thus recognised into an independent government of a foreign sovereign State entitled outside its territory to jurisdictional immunities, in particular as against the government recognised *de jure*, in respect of its property or its representatives.[31]

H. LAUTERPACHT.[32]

[31] In November, 1938, the Supreme Court of Norway gave judgment in a dispute between the Spanish Republican Government and a former secretary to the Spanish Legation at Oslo who refused to deliver to the Republican Government the property of the legation. He claimed that in view of the recent agreement between Norway and the insurgent authorities concerning the exchange of commercial agents, he represented a foreign sovereign State and that the Norwegian Courts therefore had no jurisdiction. It was held that the property must be delivered up to the Republican Government seeing that the exchange of agents could not be interpreted as recognition of the Nationalist Government: *The Times* Newspaper, 8th November, 1938. The Courts of other countries were concerned with the Spanish Civil War mainly from the point of view of the effect of the requisition decrees of the Spanish Republican Government. See, e.g., the contradictory decisions of the Court of Poitiers of 26th July, 1937 (*Rousse et Maber* v. *Banque d'Espagne*) and of the Court of Rouen of 7th December, 1937 (*Etat Espagnol et Banque d'Espagne* v. *Banco de Bilbao*: Sirey, 1938, II, pp. 17–24). See also the decision of the Brussels Court of Appeal of 7th July, 1937 (*Journal des Tribunaux*, 6th March, 1938), and the decision of the same Court of 17th January, 1938 (*Rechtskundig Weekblad*, 1938, No. 2, col. 801)—both affirming the right of requisition. They are reproduced by van Hille in *Revue de Droit International et de Législation Comparée*, 3rd ser., vol. XIX (1938), pp. 332–336. And see *Moulin* v. *Volatron*, decided on 25th May, 1937, by the Commercial Tribunal of Marseilles (*Sirey*, 1938, II, p. 105), where the Court refused to give extraterritorial effect to certain nationalisation decrees of a penal character.

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ROAD TRANSPORT—ECONOMICS AND THE LAW

THE Road and Rail Traffic Act, 1933, following on the Report of the Royal Commission on Transport, 1928, and on the recommendations of the Salter Conference on Road and Rail, 1932, is a measure designed to regulate the carriage of goods by road. Section 1 (1) of the Act forbids the carriage of goods by road except under licence. Section 2 (1) divides licences into three classes, the A "public carriers" licence, the B "limited carriers" licence and the C licence for private carriers who do not carry for hire at all. Section 3 (1) determines the period for which licences are valid, 5 years for A licences,[1] 2 years for B licences and 3 years for C licences. Section 4 charges the Chairmen of the Area Traffic Commissioners, constituted by the Road Traffic Act of 1930, with the duties of Licensing Authorities. Section 6 (1) gives them "full power in their discretion either to grant or to refuse the application for an A or a B licence." Sub-section (2) requires the Licensing Authority "in exercising his discretion to have regard primarily to the interests of the public generally, including those of persons requiring as well as those of persons providing facilities for transport" and certain other minor conditions. Section 11 (2) requires the Licensing Authority, when hearing applications for licences, to take into consideration any objections to the application which may be made by persons who are already providing facilities, on the grounds that suitable facilities in that district, or between those places are or would be (were the application to be granted) in excess of requirements. Section 15 allows disappointed applicants or dissatisfied objectors to appeal against the decision of a Licensing Authority to an Appeal Tribunal, consisting of three persons, one of whom must be a lawyer.

A great many appeals have been heard since the Act became effective in 1934. It is the object of this paper to examine some of the tendencies revealed by these decisions. The author has been trained as an economist, and not in the law, and in what follows he has confined himself to the economic consequences of legal decisions. Legal rule and precept can deflect, promote and discourage economic tendencies—the law indeed, must be counted a fundamental economic force in itself, for all economic activity presupposes some type of social organisation, and the

[1] As amended by Ministerial Order under authority of the Road Traffic Act, 1937.

form this takes depends upon the law. The Act is creating a new body of law—law within which the road transport business must be operated. It is important that the economic consequences of this nascent body of law should be examined now, before the rules of interpretation which the Tribunal is laying down have had time to crystallise into rigid precedents. For it is the author's opinion that the overriding interest of the public in an economic and efficient transport service, which the Act explicitly recognises and safeguards (Section 6 (2)) is being jeopardised by the construction which the Tribunal is placing upon the Act—a result surely contrary to the purposes of the Act and one which could never have been intended by Parliament.

The central principle underlying the decisions of the Tribunal is this—

(1) Suitable transport facilities in excess of requirements create wasteful competition.

(2) Wasteful competition is not in the public interest nor in the interest of those requiring or providing transport, and is therefore against the intentions of the Act.

From this principle the Tribunal infer that additional licences should not be granted when suitable facilities are already in excess of requirements, or would become so were the licence to be granted.[1a] Thus, in order to set up as a haulier, or in order for an established haulier to expand his business, the applicant must prove a need for his service; that is, he must show that existing transport facilities are inadequate or unsuitable, and that there is a demand for his service.

It is to be noted that the Act itself says nothing at all about wasteful competition. The term is nowhere mentioned. Nor does the Act guide the Authorities and Tribunal. No definition is given of "need" or of "suitability." It has been left entirely

[1a] (All references to Sweet and Maxwell, Railway Canal and Road Traffic Cases, edited by Maxwell and Fay.) (Italics mine.)

L.M.S. & L.N.E. Rly. Cos. and J. T. Dunnett, Vol. 23 at p. 280.

G.W. & L.M.S. Rly. Cos. and Smart, Vol. 24 at p. 281—

"The conclusion we have come to is that, generally speaking, it would not be in the public interest or in the interest of persons requiring or providing transport facilities for a licensing authority to authorise a person to use additional vehicles if on the facts of the case he decided that suitable transport facilities in the district intended to be served by the applicant or between the places the applicant intends to serve exist and are in excess of requirements, or if the application were granted would be so. *Our principal reason* for coming to this conclusion is that in our opinion if a licensing authority *authorises suitable transport facilities in excess of requirements the inevitable result will be wasteful competition* which in our opinion is not in the public interest or in the interest of persons requiring or providing facilities for transport."

Four Amalgamated Rly. Cos. and Bouts-Tillotson, Vol. 25 at pp. 179–180 where this passage was quoted and reaffirmed, and at pp. 181–182.

to the Tribunal to decide what is meant by these terms, and definition must be sought in the very large number of cases which have been decided by the Tribunal.

On the question of "*suitability*," the evidence required is that of the trader, the haulier's customer, who must appear *in person* to support the application.[2] The trader must show that existing facilities, generally the services of the objecting railway company, are unsuitable for his traffic and that the facilities the applicant is offering are more suitable. But it is no use the trader *asserting* that this is the case. He must prove it to the satisfaction of the Licensing Authority and against the cross-examination of railway counsel. The trader's evidence is not always accepted as final.[3] In a number of cases it has been held that the trader has not shown that the railway facilities are unsuitable for his traffic or not so unsuitable that road service is justified. Thus the trader is not the final judge of what form of transport suits his traffic best. That lies with the Licensing Authority and the Tribunal.

The problem of deciding whether "suitable" facilities are in excess of requirements can never be an easy task; but it is made much more difficult when the Authorities do not know quantitatively what the requirements are, nor even what facilities are already available. The only information which the Licensing Authorities have before them when they are asked to grant or refuse licences, besides such knowledge as they may themselves have acquired of the general position in their area, is evidence brought by the applicant to show that his services are in demand and fulfil a need; the statements, that is, of one, or at the most, the few traders supporting the application, that they cannot get the transport they require or that existing services, although adequate, are unsuitable; and on the other side the evidence of the objector, that he can provide or is providing all the services which the applicant's customers can demand. The objector is usually the railway company and the objection is often, in effect, that the railway service is both adequate and suitable for all the needs of the particular traders who are supporting the application or for whom the applicant carries.

The public need for road transport services within the terms of the Tribunal's decisions depends upon the *in*convenience

[2] *Charman and Southern Rly. Co., Vol.* 22, p. 116.
Hawker and G.W. & L.M.S. Rly. Cos. (No. 2) Vol. 25, p. 99.
[3] *Shepherd and L.M.S. Rly. Co.*, Vol. 23, p. 173.
Hawker and G.W. & L.M.S. Rly. Cos., (No. 2) Vol. 25, p. 99.
L.M.S. & L.N.E. Rly. Cos. and Stevenson Transport Ltd., Vol. 25, p. 328.

which is suffered by traders who have to do without that service.[4] The public interest is served by the provision of road transport only if some degree of positive inconvenience would result to someone were that transport not available;[5] an inconvenience which must be so acute that some trader is prepared to waste his time telling a Court about it and be willing to submit to cross-examination about the details of his business by railway counsel. Without that inconvenience, the Tribunal is, in fact, maintaining that a service cannot be necessary and that there is no justification for it in the public interest.

The Tribunal and the Licensing Authorities have here adopted a very rigorous standard. In most fields of economic activity, it has generally been considered that the public interest is promoted and the service in question justified if it does no more than provide an additional convenience for the public. Indeed in theory, and even to-day in practice as well over a very large field, it is still considered evidence enough of public need if a profit can be made from the provision of a service or the production of a particular commodity. But the Tribunal has expressly refused to allow the fact that additional road transport would be a convenience[6] to the trader or that a profit[7] might be

[4] *Ridgewell and Co. and Southern Rly. Co.*, Vol. 22, p. 6.
Hawker Ltd. and G.W. & L.M.S. Rly. Cos., Vol. 23, at p. 29.
G.W. & L.M.S. Rly. Cos. and Smart, Vol. 24, at p. 283.
H. W. Hawker Ltd. and G.W. & L.M.S. Rly. Cos., (No. 2) Vol. 25, at p. 106.
". . . the appellants had to establish a case within the terms of our decision in *Ridgewell's Case* . . . and to do that they had to prove that since the date of the grant of the first application for a variation (1) there had been an increase in their own business; (2) there had been an increase in the business of their customers . . . and (3) *their customers had suffered inconvenience* by reason of the appellants not having been able to provide the transport they required. In saying this we are only repeating what we have said in a number of cases . . ." and at p. 109.
Four Amalgamated Rly. Cos. and T. W. Foster, Vol. 24, at p. 272.

[5] *John and Patricia Forrester and G.W.R. Rly. Co. Ltd.*, Vol 23 at p. 228 where the Licensing Authority said: "At the hearing on July 31, 1934, I came to the following conclusions—
"(1) That the appellants had by putting on the road eleven new vehicles . . . flooded the market . . .
"(2) That such traffic had *in the past* been carried by other carriers including the railway company without complaint.
"(3) That such other carriers could have continued to carry such traffic without any *undue* inconvenience to the public." At p. 239 the Tribunal said: ". . . we are of the opinion that Mr. James (the licensing authority) was fully justified in expressing the views and in coming to the conclusions which he did."

[6] *L.N.E. & L.M.S. Rly. Cos. and Gimson*, Vol. 24 at p. 85.

[7] *Axford and Southern Railway Co.*, Vol. 24 at p. 82.
"The only evidence which was called in an attempt to establish a prima facie case was that of Mr. Axford who suggested that now he has occasion to make journeys to Glasgow, it would be more economical or profitable for him if he was allowed to carry goods on his return journey for persons other than the British Lead Mills. In our opinion Mr. Axford . . . has . . . failed to establish a prima facie case."

made out of a particular service to rank as evidence of public need.

An established haulier, one, that is, already in business, can obtain licences for additional vehicles if he can show—

1. That there has been an increase in his own business.

2. An increase in the business of his customers or of some of them or in the industries in which those customers are engaged, and

3. That some at least of his customers have been put to inconvenience because the applicant has not had sufficient vehicles available to serve them.[8]

All this must be proved by oral evidence.

Licences will only be granted to persons wishing to enter the haulage business for the first time if they can prove a need for their services, a need which is not being met by some existing carrier. To do this they must show—

(1) That there are persons able and willing to employ them, and

(2) That the haulage work they are proposing to do could not be done by some existing carrier by road or rail,[9]

and once again oral evidence on these points will be necessary. Thus the road haulage business has ceased to be an industry which one may embrace because one wants to make a living or because one sees a chance of providing a service and gaining a profit. The intending haulier must prove a need, and a need within the terms of the Tribunal's decisions.

A licence for additional vehicles will be refused if it is shown that the traffic to be carried by the applicant has been, or will be, abstracted from some other operator by rail or road, who is already providing an adequate and suitable service.[10] To justify

[8] *Ridgewell and Co. and Southern Rly. Co.*, Vol. 22, p. 6.
L.N.E. & L.M.S. Rly. Cos. and Beazley, Vol. 24, p. 111.
H. W. Hawker Ltd. and G.W. & L.M.S. Rly. Cos., (No. 2), Vol. 25 at p. 106.

[9] *Enstone and Co. and L.M.S. Rly. Co.*, Vol. 22, p. 3.

[10] *Enstone and Co. and L.M.S. Rly. Co.*, Vol. 22 at pp. 5–6.
(The applicant) "must lead evidence sufficient to make out . . . that the haulage work which he proposes to carry on or embark upon cannot for some reason be done by other operators already engaged in carrying, whether by road or by rail."
Petrie and G.W. Rly. Co., Vol. 22 at p. 16.
L.N.E. Rly. Co. and Brownbridge, Vol. 22 at p. 256 and p. 257.
". . . the traffic which he would carry if authorised to use another vehicle would be traffic abstracted from the railway company or other hauliers."
Henry and Elsie Shepherd and L.M.S. Rly. Co., Vol. 23 at p. 175.
Forrester v. *G.W. Rly. Co.*, Vol. 23 at p. 228 and p. 233.
L.N.E. Rly. and Hurd; Newhams Ltd., and Hurd., Vol. 22 at p. 149.
H. W. Hawker Ltd. and G.W. & L.M.S. Rly. Cos. (No. 2), Vol. 25 at p. 110.
". . . if the applicants sought to be authorised to use additional vehicles for the purpose of carrying Harris' traffic, he must, in view of the fact that this traffic had hitherto been carried by rail, be satisfied that there was some good reason why it should no longer be so carried; . . ."

a licence, the traffic to be carried must therefore not be obtained at the expense of somebody else—it must be a new traffic[11] or a traffic for which existing facilities are less suitable than those proposed.[12] But new traffic, no matter how strong may be the potential demand, will not be able to show itself as ton miles of transport until the service needed to carry those ton miles is made available and has had time to develop the demand. It seems, therefore, that the Tribunal has blocked the door to any expansion of the road transport business above the level of the base year, 1932/3. For only new business can justify a licence for additional vehicles. That business will not normally be evident as traffic until those vehicles are carrying it; and the Tribunal will not allow a licence to be granted until the new traffic is there to be proved. The hindrance to expansion is fortunately not so complete as this, since a haulier, already licensed to provide a service, can develop new business and then apply for additional vehicles, broadly on the grounds that his vehicles are overworked because of the increase in his business, and his customers, both new and old, are being put to inconvenience.[13]

The other gateway for the intending haulier is for him to show that he can provide a suitable service where none is available. This cannot be an easy thing to prove when there can be no opportunity of giving a practical demonstration until a licence is granted and, of course, the licence will be withheld until such proof is forthcoming.

But even in cases where an operator has had the opportunity of developing a new and apparently successful business, the licence is not always granted. Too great a success may arouse the suspicions of the Licensing Authority and cause him "to consider very carefully whether to grant additional facilities would have the effect of abstracting traffic from other persons

[11] *John Rhodes and L.M.S. Rly. Co. and another*, Vol. 22 at p. 268.
"The appellant admitted in evidence . . . that the carrying he was doing was not new traffic . . . further he stated that the traffic he was now carrying had been previously carried by other persons."

[12] *Smith and L.M.S. Rly. Co.*, Vol. 22 at p. 265.
"In our opinion there was evidence that the facilities provided and to be provided were of a special type such as did not exist in the Manchester district before the appellant started his service."
L.M.S. Rly. Co. and Tait and MacConn., Vol. 22 at p. 203.
"Mr. Wilson has pressed upon us that . . . before the respondents made their application, goods belonging to the traders . . . must have been carried by somebody. We have no doubt that that is correct but the vehicles . . . in which they were carried were not suitable for the carrying of the class of goods which those traders wanted to be carried."
John Edwards and L.M.S. Rly. Co., Vol. 23 at pp. 68 and 71.

[13] *Hawker Ltd. and G.W. & L.M.S. Rly. Cos.*, Vol. 23 at pp. 36–37.
G.W. & L.M.S. Rly. Cos. and Smart, Vol. 24 at p. 285.

already providing transport facilities in that area."[14] This application was not refused on the ground that the business had been too successful. But very rapid growth did not seem to have helped the applicant at all.

Even more significant is *Forrester's Case*.[15] Forrester had established a parcels service connecting Cardiff with the inland villages up the valleys. He provided a service which did not exist before, and worked up traffic between Cardiff and these villages, profitable to himself, and apparently of convenience and value to the public, judged at least from the fact that his service was patronised. This business was new business, since there had been no traffic between Cardiff and these villages before, and it met a public demand. The demand, admittedly, had not been evident before the applicant instituted his service. It remained potential only and did not become active and effective until enterprise, in the person of Mr. Forrester, provided the service which allowed this potential demand to manifest itself as the offer of ton-miles of transport between Cardiff and villages hitherto unconnected with that centre.

On the face of it, this would seem to be an eminently suitable case entitling an operator to a licence. A hitherto unsuspected public demand is shown to exist, a service is provided to satisfy it, and new business worked up thereby—clear evidence of public need. The operator applied in due course for a licence for his vehicles. His application was refused in part and this refusal was confirmed on appeal. It was refused because the services proposed were too frequent, so frequent as to be wholly wasteful and unnecessary, and because the natural centres for the villages without direct rail connection with Cardiff were towns other than Cardiff. Enterprise in this case had shown a demand to exist, but the Licensing Authority would have none of it. This demand should not be satisfied because, in the Licensing Authority's own words, there was no "community of interest" between Cardiff and the places named. Community of interest had had, so far, no opportunity to develop, because there were no easy and direct connections between these places. Unable to obtain his licence, this applicant has been forced to provide some of the services with horse-drawn vehicles!

This case has not become a leading case, nor has it been cited in any subsequent appeal. This is perhaps fortunate, otherwise an operator, to justify the grant of a licence, might have to

[14] *Henry and Elsie Shepherd and L.M.S. Rly. Co.*, Vol. 23 at p. 175.
[15] *John and Patricia Forrester and G.W. Rly. Co.*, Vol. 23, p. 225, especially at pp. 231–233.

prove, not only that there was an unsatisfied demand to be exploited, but also that this demand arose out of a proper and acceptable community of interest between the places he intended to serve—a task which might involve a considerable amount of historical and sociological research.

Licences only last for a limited time and renewal is not automatic. Each applicant for renewal must prove that there is a continuing need for the services which are being provided. The Tribunal will grant a renewal if the applicant can show—

(1) That during the currency of his previous licence his vehicles had been regularly and fully employed;

(2) That there has been no material change in the circumstances of his business.[16]

Provided always that there are no overriding circumstances, such as the existence of adequate and suitable facilities without the applicant's service, then the licence will be renewed. But if, for example, the railway company can show that its services are suitable and adequate, then the renewal will not be granted, even though it is held that the applicant's vehicles have been regularly and fully employed in the past and that there has been no material change in his business.[17]

Change in material circumstances are such things as changes in the areas served, in the traffics carried or, apparently, in a haulier's customers. If any such change has occurred, then the applicant must start afresh to prove a need for the new services he is now operating.[18]

The Act of 1933 does not specify the rates charged by road operators among the matters which Licensing Authorities shall consider, and the Tribunal has refused to allow questions of rates as relevant evidence.[19] It seems very extraordinary to the

[16] *Four Amalgamated Rly. Cos. and Bouts-Tillotson Transport*, Vol. 25, p. 158.

[17] *L.N.E. Rly. Co. and Blyth Transport Ltd.*, Vol. 26, p. 202.

[18] *Modern Haulage Services Ltd. & L.M.S. & L.N.E. Rly. Cos.*, Vol. 25 at pp. 285–6 and p. 288.
Hargreaves and L.M.S. Rly. Co., Vol. 26 at p. 59.
O'Sullivan and G.W. Rly. Co., Vol. 26 at p. 160.
Barnett Joel Ltd. and L.N.E. Rly., Co., Vol. 26 at p. 141.
Oxlade and G.W. Rly. Co., Vol. 26, p. 234.

[19] *L.M.S. Rly. Co. and A. L. and P. Ingleby*, Vol. 24 at p. 299.
Four Amalgamated Railway Cos. and Bouts-Tillotson, Ltd., Vol. 25 at p. 175—
"We think it is clear from the Act that the legislature did not intend that the licensing authority should, when exercising his discretion, have regard to the fact that in very many instances goods can be and are carried by road at rates which though economic to the road haulier are lower than the rates at which the railway companies can carry those same goods." This opinion was quoted and reaffirmed in *L.M.S. & L.N.E. Rly. Cos. and Stevenson Transport*, Vol. 25 at p. 334:—
"After giving further consideration to the matter, we are of opinion that the Legislature did not intend that questions relating to rates should be taken into

layman that a piece of legislation should have been placed upon the Statute Book, or that a competent Tribunal should make decisions, in which the questions at issue are a matter of economics and not of law; and even more, in which the main question to be decided is usually the provision of a greater or less amount of a competing service, without there being considered *at all*[20] the relative prices at which these services are offered. The suitability or otherwise of two services cannot be compared unless the prices at which they are being provided are also considered. A service which is suitable at one price may be distinctly unsuitable at another, higher, price; and a service suitable enough at the price asked in and by itself may become unsuitable just because an equivalent service is being offered at a lower price or a better service at the same or even a higher price.

The Licensing Authorities are asked to decide whether or not existing facilities are suitable and whether such facilities are, or are not, in excess of requirements. Neither of these questions can be answered reasonably without reference to the prices asked for the services.

In most of the cases which come before the traffic courts supported by the evidence of traders, it is claimed that the road services are at least equal to, if not better than the railway services, and the charge by road is almost always the less. From the trader's point of view, therefore, there can be no doubt that

consideration when deciding whether or not an objector had proved that suitable facilities exist. This opinion is based on the provisions of the Act and on the assistance which we think can be obtained from a study of some of the provisions of the Road Traffic Act 1930." See also pp. 334–336.

But in *Bouts-Tillotson Ltd. and Donaldson Wright Ltd.*, Vol. 23 at p. 129, the Tribunal held that "a licensing authority is in our opinion on that issue (of public need for additional vehicles, the issue that is "whether if the application were granted transport facilities would be in excess of requirements") and only on that issue entitled to take into consideration allegations that applicants had been carrying goods at rates uneconomic to themselves." See as well, *L.M.S. Rly. Co. and Ingleby*, Vol. 24 at p. 297; *L.N.E. & L.M.S. Rly. Cos. and Beazley*, Vol. 24 at p. 116 . . . "whether the increase (of gross receipts) is due to "false traffic," e.g. traffic which has been obtained by charging rates which are uneconomic to the applicant." *and L.M.S. & L.N.E. Rly. Cos. and Stevenson Transport*, Vol. 25 at p. 336:—"What we have said in this decision on the subject of rates (quoted above) is not intended in any way to alter or vary what we said in the appeal of *Bouts-Tillotson and Donaldson Wright Ltd.*, with regard to rates which are proved to be uneconomical rates and with regard to "false traffic." In *Alexander (Charles) and L.M.S. & L.N.E. Rly. Cos.*, Vol. 26, p. 260, the Tribunal distinguished this precedent "As at present advised we are not prepared to go further than to express the opinion that in coming to a decision on the question of "suitability" the fact that the rates charged by Mr. Alexander are lower than the rates by rail should be taken into consideration if it was proved that the traffic would not pass *at all* but for those lower rates being available" (p. 295). (Italics mine.)

[20] Except in the extreme case where the traffic would not be forthcoming without the lower road charge.

the railway services are relatively unsuitable. Lower rate by road makes road transport more suitable than railway, for business purposes, in all cases where the two services are at least equal in quality.

The case is the same with the question of facilities in excess of requirements. Facilities will exceed requirements when more service is provided than will be used at the price currently being asked. If the provision of facilities at a relatively low price is refused because there are available transport services at a higher price, then some of the demand must be unsatisfied—that part of the demand which is prepared to employ the service at the lower price. Consequently the total of facilities available at the higher price will be less than is required to meet the demands of the public. The law does not recognise the existence of any elasticity in the demand for transport, does not appear to appreciate the point that if a new and, in certain respects, improved transport service is offered at a lower price, then the demand for transport will increase and the facilities provided, adequate enough at the higher price, will no longer meet "requirements" of a demand enlarged now that transport is to be had at a lower price.

The rate of progress in the technique of road transport is very rapid at the present time. Improvements are constantly being made in the design of motor vehicles and the costs of operation are being substantially reduced. These advances in operating efficiency, if they are to be passed on to the trader, will be passed on mainly in the shape of lower rates. Any increased traffic which the road operator secures as a result of lower rates will be in part traffic obtained at the expense of the railway companies. But that is inevitable and not undesirable. If technical progress is less rapid in railway working than it is in road transport, measured by the rate at which costs are being reduced, then road transport becomes to that extent relatively a more efficient method of transport, and it is in the public interest that the more efficient method should be allowed every opportunity to expand, even though it may be at the expense of the less.

If the trader is to be benefited and the public interest thereby served by any improvement in the technique of road transport which tends to reduce rates, the trader must be allowed to send his goods by road, and also to transfer his traffic from rail to road if the lower road rate makes this worth while. The demand for road transport will be increased as much by the diversion of traffic from the railway as by the creation of new traffic, stimulated

by the lower rate. A road haulier should be allowed to expand in response to this demand.

Unfortunately neither the Act nor the Tribunal will allow reduced charges for road transport, whether the result of improved technique or not, to be a matter justifying an increase in the number of vehicles. Reduction of road charges is not prohibited, but licences are not granted when it is evident that the intending haulier has obtained his traffic or will obtain it at the expense of some other operator, rail or road. Thus there is serious danger that the Act, as interpreted by the Tribunal, will prevent the very rapid improvement which is taking place at present in the operation in road transport from being passed on to the trader and, through him, to the public.

By its rules of interpretation, the Tribunal has inhibited very much both change and enterprise in the road transport business. Enterprise does not have the opportunity of working up new services and thus creating a demand for its product, and any change in an existing business is very much discouraged lest these changes should jeopardise renewal. This again blocks enterprise, for enterprise in an established business cannot make itself felt without bringing changes in its train. The road haulage business to-day, consisting as it does of a very large number of small businesses in active competition with each other, and nearly all under the immediate personal control of their owners (and, more often than not, of their founders too), is a business in which conditions are particularly favourable for the consumer to enjoy the fruits of enterprise. Yet road transport is not permitted to offer the quantity of transport which provides the most efficient service to the trading community: it is being restricted to providing a quantum of service just enough to remove inconvenience. The trader in effect is being prevented from choosing the type of transport which suits him best, not because the Licensing Authority and Tribunal are dictating which he shall patronise, but because, wanting to use road transport, he may not find the facilities are available because the licences have not been issued.

Then the whole business of restriction is being made very irrational, for what is often the real reason and justification of the demand for road transport, cheaper rates, cannot be considered in evidence. Thus, unable to plead lower rates, many traders are forced into far-fetched and not very plausible reasons for preferring road transport, when their real ground is the lower charge compared with the railway rate.

The losers by restriction are the traders immediately, and

the public ultimately, for the development of a new and cheaper transport service is hindered; and a number of new services which this technical development makes possible are prevented from coming into existence. The beneficiaries should be both the haulier who can keep his licence—for he is protected from the competition of new entrants to the haulage business—and the railways who obtain the traffic which the restricted road haulage business has not the capacity to handle. The existing hauliers have not gained as much as might be expected. For one thing, competition between them has remained exceedingly active, despite the opportunities for combination offered by restriction. For another, the demand for road transport has been rising so rapidly since the Act became effective in 1934, that established hauliers would have gained more from the unlimited right to extend their fleets than they would have lost through the influx of new firms into the business, particularly as goodwill is a very important part of a haulier's stock-in-trade—a goodwill which would have protected the established haulier against the competition of the newcomer. The real beneficiaries of the restrictions imposed on road transport by the Act of 1933 and the Tribunal are the railway shareholders, who have received a dividend in recent years, where none otherwise would have been forthcoming.

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BUILDING SOCIETIES AND POOLING AGREEMENTS

THE BORDERS CASE AND ITS CONSEQUENCES

THE great interest[1] shown by the public in the case of *Bradford Third Equitable Building Society* v. *Borders*, [1939] 1 All E.R. 481, was not solely due to the fact that a taxi-driver's wife (nicknamed "Portia" by the Press) was arguing her case in person against the best brains of the Chancery Bar, but was also due to a realisation that the legal points in issue affected many of them very closely. This interest was indeed fully shared by the legal profession; so much so that when Bennett J. came to deliver his judgment the corridor outside his Court was filled with a crowd of solicitors and barristers struggling with the ushers in an endeavour to force an entry into the already over-crowded court.

As will be shown later, the case was important not so much for what it decided, as for the points that it raised and the action of the legislature which it inspired. But before dealing with the case itself it may be advisable to explain shortly the exact nature of the arrangements usually made between the Building Societies and builders of estates of houses.

As is well known, a prudent mortgagee does not normally lend more than 75 per cent (at the most) of the value of the security; on the other hand, most purchasers of small houses cannot afford to put down a deposit of anything like 25 per cent of the purchase price and in fact builders usually advertise that they can arrange building society advances up to 90 or 95 per cent. This does not mean, as the uninitiated might suppose, that the building societies are of the opinion that the houses are really worth substantially more than the purchase price—that, of course, is most unlikely to be the case. The building societies will not be prepared to lend more than 75 or 80 per cent on the house alone; if more is to be advanced collateral security will have to be given. In order to provide this collateral security the builder enters into a "Pooling Agreement" with a building society which provides that whenever the society advance more than their normal proportion the builder shall guarantee the repayment of the excess, the whole or a proportion of which shall be retained by the society out of the purchase price and placed to the credit of a pool account which the builder charges as

[1] It was even the subject of a music-hall joke—"We may have no frontiers but we have our Borders."

collateral security. Thus if the value of the house and the selling price is £1000 and the society's normal advance would be £750 but the purchaser requires an advance of £900, then £150 of the purchase price may have to be left in the pool. This pool furnishes a continuing collateral security for all such mortgages granted to purchasers of houses on the building estate and frequently it is provided that the proportion to be retained in the pool shall progressively decrease with the number of mortgages granted. When a purchaser has repaid to the society sufficient to reduce the amount outstanding on his mortgage to the level of a normal advance (or, in some cases, to a lower level) the amount of the excess left in the pool is repaid to the builder. If on the other hand the purchaser defaults on the mortgage and the house is sold by the society at a loss the amount of this loss is deducted by the society from the pool.

It will be noticed that under this arrangement it is not the purchaser-mortgagor of the house who furnishes the collateral security, but the vendor-builder, who finds it necessary to do so in order to sell his houses. The purchaser need not know anything of the arrangement made between the builder and the society and may think that the whole advance is made on the security of the house alone. It may be mentioned that the Pooling Agreement usually provides that if the purchaser defaults on his mortgage, the vendor-builder shall take a transfer of mortgage from the society or shall purchase the house from them at a price equal to the amount then outstanding on the mortgage together with all interest, fines and costs. So far as repurchasing is concerned, this clause has always been regarded as of very dubious legality. It is well established that although a mortgagee is not a trustee of his power of sale he must nevertheless conduct the sale properly and sell at a fair price, but in fact under such an arrangement the purchase price is determined in a manner which bears no relationship at all to the value of the house. On the other hand it is rare for any real hardship to be caused to the purchaser; he normally regards the mortgage instalments as something in the nature of rent and if he cannot continue to pay he is only too pleased to vacate and does not care what happens to the property so long as he is not sued on the personal covenant. Moreover, default usually occurs before many instalments have been repaid and it must be comparatively rare for builders to make a profit as a result of a repurchase. On the other hand, such an arrangement is beneficial to the builder since if the society sell to a third party and make a loss it will be deducted from the pool and, therefore, borne by him. He is in at least as

good a position as the society to effect a sale at a good price and if any redecorations are necessary he can effect them more cheaply than the society could do. It is, therefore, better for him to repurchase and thus to preserve the pool intact. It may well be, however, that he has not the necessary cash available to repurchase. In this event it is usual for completion of the contract to repurchase to be postponed until the builder finds a new purchaser when the society will convey direct to the new purchaser. In the meantime, a contract to repurchase is in existence and the house can, therefore, appear in the books of the society as having been resold without loss, and this even although it may be highly problematical whether completion will ever take place!

In the *Borders Case* the Building Society had advanced on a freehold house £693 out of the total purchase price of £730. The normal advance would have been £545 but the Society had taken collateral security from the builders under a Pooling Agreement of the type explained above. The builders subsequently went into liquidation so that when the purchaser (Mrs. Borders) failed to keep up her repayments the Society were unable to exercise any rights they may have had against the builders to compel them to repurchase but were forced to exercise their power of sale. As a preliminary they issued a writ for possession. Mrs. Borders in her defence alleged that she had never executed the mortgage deed on which they sued. The learned Judge decided that they had not succeeded in establishing that the deed ever had been executed by her and their claim therefore failed. The evidence on this point is reviewed at some length in the judgment and is certainly not devoid of interest. It is, however, a pure question of fact raising no point of legal interest. A point of law of some slight interest did arise on the contention of the Society that Mrs. Borders was estopped from alleging non-execution of the mortgage since she had made certain repayments under it. The Judge rejected this contention on the ground that she had stated the facts as she alleged them to be at the time when she made these repayments. This aspect of the matter requires no further consideration. Neither does Mrs. Borders' contention that the Society were not entitled to possession since three months' subscriptions were not in arrear; this too was a pure question of fact and of construction of the mortgage deed and on this point the Judge found in favour of the Society.

The first point of real legal importance was raised by Mrs. Borders' further ground of defence, namely, that the transaction between the Society and herself was *ultra vires* the Society owing

to the existence of the Pooling Agreement. In support of this contention she relied on the provisions of the Building Societies Acts and on the rules of the Society. S. 13 of the Building Societies Act, 1874, provides for the formation of societies for the purpose of raising a fund for making advances to members "upon security of freehold copyhold or leasehold estate by way of mortgage." S. 25 of the Act (as subsequently amended) makes provision for the investment of funds "not immediately required for its purposes," but this section clearly has no relevance to this case which accordingly turns on the true construction of s. 13. It will be observed that this refers only to "freehold copyhold or leasehold estate" and it is clear that the pool is not "freehold copyhold or leasehold estate." On the other hand, the section places no limit on the amount that can be advanced; there is nothing to prohibit an advance on freehold or leasehold estate up to 100 per cent of its value and it therefore seems absurd if the transaction is invalidated because additional security is taken.

The only direct previous authority on this point was *Sheffield & South Yorkshire Permanent Building Society* v. *Aizlewood* (1884), 44 Ch.D. 412. In that case a loan had been made upon a mortgage of a leasehold colliery and as collateral security a charge upon certain interests in personal estate. It was held by Stirling, J., that the whole transaction was not invalidated by the inclusion of the collateral charge, otherwise, as the learned Judge pointed out, it might be argued that the inclusion of a personal covenant might invalidate the mortgage. But the Judge added (at p. 452)—

> "The benefit so obtained must, however, be purely collateral and the validity or propriety of the transaction is to be tested as if no such ingredient entered into it. If there be no freehold, copyhold, or leasehold estate comprised in the security, or if the estate so comprised be merely nominal, or its value out of all proportion to the amount advanced, the transaction is beyond the powers of the society and invalid; but where, as here, the borrower offers as security such estate to a substantial extent, an advance is within the powers conferred by the Act of 1874 and the question for the officers of the Society to determine is what amount may properly be advanced. . . ."

On the basis of this decision, Bennett, J., decided that the mortgage in question was not beyond the statutory powers of the Society—

> "It is," he said (at p. 496), "a mortgage of freehold estate. The security of the freehold estate is not merely nominal. As between the plaintiffs and the defendant the transaction is one of loan on the security of freehold property. It is not a case in which freehold land

has been added to unauthorised security merely to make it appear that the transaction was one of loan upon authorised security when the truth was otherwise."

Although these observations were presumably *obiter* in view of the previous decision that the mortgage deed had never been executed by the defendant, they constitute a clear statement that a mortgage on land is not invalidated by the addition of collateral security provided that the land constitutes the primary and basic security. On the other hand, they do not determine whether the pooling agreement and the collateral security were valid as between the Society and the builders. This important point was not raised and it seems could only have been raised in an action between the Society and the builders or possibly by a member of the Society suing on behalf of himself and all other members. It was indeed expressly left open by the learned Judge, who continued—

"I express no opinion upon the validity of the pooling agreement between the plaintiffs and Morells (the builders), or upon the validity of the collateral charges given by Morells to the plaintiffs. That raises quite different considerations, and those considerations are not raised by the defendant's defence."

Nevertheless it seems that in view of the terms of s. 13 the collateral charges cannot be valid; the pool is definitely not "freehold, copyhold or leasehold estate" and the opinion that a charge is only valid if on such estate appears to underlie the Judge's decision. This view is supported by the observation of Lindley, L.J., in *Cullerne* v. *London and Suburban Permanent Building Society* (1890), 25 Q.B.D. 485, at page 488—

"On looking carefully at the statutes by which these societies are governed . . . it certainly does appear that building societies can only advance money on the security of landed property, freehold, copyhold or leasehold."

As we shall see, this point is to be dealt with by legislation.

But on the question of *ultra vires* Mrs. Borders had a second string to her bow; she contended that in any case the transaction was outside the scope of the rules of the Society. These provided, *inter alia*, that the object of the Society should be "to make advances on freehold or leasehold estate by way of mortgage pursuant to the Building Societies Acts" (Rule 1). By Rule 23 the land proposed as security had to be valued by the Society's valuer. Rule 24 provided that, "When the directors are of opinion that the premises are a sufficient security . . . the amount granted shall be paid to the borrower on his executing a mortgage of the premises. . . ." The learned Judge construed

Rule 24 as limiting the amount which the directors might advance "to such an amount as they think can be recovered out of the land taken as security without regard to anything else" (page 497). There had, therefore, been a breach of Rule 24 since but for the collateral the directors would only have advanced £545 instead of £693. But the Judge held that a mere breach of the Society's rules did not invalidate the transaction provided that it was within the statutory powers of the Society. This is a question of some difficulty upon which the legal principles are not entirely clear. Apparently since the rules can be altered by the members in general meeting, a breach of them must be regarded as a mere domestic matter only concerning the members of the Society and not affecting third parties.

In addition to her defence, Mrs. Borders counterclaimed (1) for damages for fraudulent misrepresentation and (2) for an injunction to restrain the Society from continuing to enter into similar *ultra vires* transactions in the future.

The latter claim can be disposed of shortly. It failed because the Judge had already held that the transaction was not *ultra vires* and because Mrs. Borders could only obtain an injunction if she was a member of the Society and this she had never become since she had not executed the mortgage.

The first claim is more difficult and interesting. The Judge held that it had been represented to her: (i) That the houses on the estate were inspected more than once by the surveyors to the local authority and the Society respectively; (ii) That the Society would advance upon the security of one of the houses 95 per cent of its contract price; and (iii) That this alleged fact was proof that the houses were exceptionally well-built. In fact the house was damp, badly built of bad materials and did not comply with the local bye-laws, while 95 per cent was not, of course, lent on the security of the house alone. He held, however, that the representations were made by the builders only and not by the Society who were, therefore, not responsible for them. The position was complicated by the close relationship between the builders and the Society which is bound to exist when there is a pooling agreement. This was accentuated in the present case since the secretary of the builders was the managing clerk of the firm of solicitors who acted as agents of the Society's solicitors for certain purposes; moreover, some of the representations were made in a brochure of which the directors of the Society were apparently aware. Nevertheless, the learned Judge held that none of these facts was sufficient to make the Society responsible for the representations. The analogous question of

whether a society should not be deemed to give some warranty of the fitness of the house will be discussed at greater length in connection with the impending legislation.

It may be mentioned, that Mrs. Borders' appeal on the dismissal of her counterclaim has been set down for hearing.[2]

As a result of this decision two Bills have been introduced by the Government and Miss Ellen Wilkinson respectively. Broadly speaking the Government's Bill is designed for the protection of building societies; it only incidentally protects purchasers of houses by enacting the code of ethics which some of the more reputable building societies have already laid down. Miss Wilkinson's Bill on the other hand is designed to protect purchasers, but in view of the Government's action it has no chance of becoming law and will only be dealt with here for the purpose of comparison with the Government's Bill, which has already been given a second reading in the Commons.

Attention should first be drawn to Clause 10 (1) of the Government's Bill which provides that nothing in the Bill shall deprive a party to any proceedings instituted before the 21st February, 1939, of any relief to which that party would otherwise have been entitled in such proceedings. The Bill cannot, therefore, affect Mrs. Borders' appeal nor any similar action (though there does not appear to be any) instituted before the prescribed date. It may perhaps be mentioned that judgment in the Borders case was delivered on the 13th February.

Clause 1 of the Bill provides that: "In determining the amount of any advance made to a member before the commencement of this Act upon the security of freehold, copyhold, or leasehold estate, a society shall be deemed always to have had power to take into account, besides the freehold, copyhold, or leasehold estate, the value of any other security for the advance." Existing collateral securities under pooling agreements and other arrangements are, therefore, declared to be valid. Miss Wilkinson's Bill contains a similar clause, but she would limit their validity to cases where the value of the land is not less than three-fourths of the amount of the advance.

However, as regards advances made after the commencement of the Bill, the value of additional security is only to be taken into consideration if it is of a class authorised by Part I of the Schedule (Clause 2 (1)). By Part I the following classes are authorised—

1. A charge upon a policy of life assurance. By Clause 2 (2)

[2] But her application to be supplied with free copies of the shorthand notes for the use of the Court of Appeal to enable her to prosecute her appeal has since been refused (*The Times* Newspaper, May 18th, 1939) and it seems that this will prevent her from carrying the case further.

such a policy is to be valued at an amount not exceeding the surrender value at the date of the advance.

2. A guarantee given by an assurance company.

3. A guarantee given by a local authority or county council under s. 91 (1) (*b*) of the Housing Act, 1936, or the equivalent provision of the Housing (Scotland) Act, 1925. By virtue of this section local authorities may enter into such guarantees for the purpose of aiding in the improvement of housing accommodation.

4. A charge given by the member of the Society upon money deposited with the Society or trustee investments. It must be noticed that this only refers to charges by the member and, therefore, does not cover a charge given by the builder or any other third party.

5. A guarantee, not being a guarantee given in pursuance of "a continuing arrangement" (below) accepted by the society with the written consent of the member and supported by a charge on money deposited with the society or trustee investments. In this case the guarantee and charge is given by a third party but any hardship to the purchaser and mortgagor is avoided by the requirement that his written consent is necessary.

6. A guarantee given in pursuance of "a continuing arrangement" which conforms to the requirements of Part II of the Schedule.

Before dealing with Part II of the Schedule reference must be made to Clause 2 (3) of the Act. This provides that where a guarantee of classes 2, 4, 5 or 6 (above) is given in pursuance of a continuing arrangement the advance shall not exceed 95 per cent of the purchase price, the "basic advance" (defined by Clause 9 as the maximum amount which the society would consider proper to advance if no collateral was given) shall not exceed 75 per cent thereof and accordingly the excess advance shall not exceed 20 per cent thereof. The only exception to this is where the Society add to the advance the amount of a single premium on a life policy for an amount sufficient to repay all sums due to the Society. In such a case the amount of this single premium does not have to be taken into consideration in calculating the amount of the advance or excess advance.

"Continuing arrangement" is defined by Clause 9 as any arrangement in contemplation of a series of advances whereby a person other than the purchaser undertakes to give to the society a series of guarantees to secure sums payable to the society in

respect of such an advance. It, therefore, covers the usual type of pooling agreement and also similar arrangements made between a building society and e.g. a housing association whereby the latter agree to guarantee excess advances made by the society. But although it covers the usual type of pooling agreement it only does so if the builder (or other third party) enters into guarantees as well as providing collateral security. This is not always done. Thus in one case known to the writer, a receiver of the assets of a building company appointed in a debenture holders' action entered into a pooling agreement under which he agreed to provide collateral security but refused to enter into any guarantees, which, indeed, the Court would probably not have authorised him to do. Such a case is not a continuing arrangement within the meaning of the Bill and, moreover, is not authorised under any of the heads of Part I of the Schedule. It is difficult to see why such a transaction should be penalised in this way. The only real protection to the society is furnished by the sums left in the pool and there seems to be no reason why the Legislature should insist upon guarantees being given in addition. As has been mentioned, there may be good reason why such guarantees should be refused.

It will be observed that not all continuing arrangements will have to comply with Part II. A charge or guarantee falling within heads 1, 2, 3 or 4 of Part I need not also comply with Part II. But all *guarantees* given in pursuance of a continuing arrangement must, unless they fall within head 3, comply with Clause 2 (3) of the Bill (above) dealing with the maximum advance and excess advance, and the minimum basic advance.

Continuing arrangements to which Part II applies must provide—

(*a*) That each guarantee will secure all sums which may become due to the society in respect of the relevant advance before the guarantor is released

(*b*) That the guarantor will not be released before the principal sum has been reduced to *two-thirds* of the purchase price

(*c*) That the guarantor will deposit in the pool as collateral security a sum which in the case of the first five guarantees shall be equal to the amount of the excess advance and in respect of each subsequent guarantee shall be equal to at least one-third of the excess advance

(*d*) That all sums in the pool shall furnish collateral security for sums due in respect of all advances made in pursuance of the arrangements being advances of which the

principal moneys have not been reduced to two-thirds of the purchase price

and

(*e*) That no withdrawal from the pool shall take place unless after withdrawal the pool shall be at least equal to—

(i) The amount by which the aggregate of the principal of the first five advances exceeds two-thirds of the aggregate of the purchase prices, and

(ii) one-third of the amount by which the aggregate of the principal of subsequent advances exceeds two-thirds of the aggregate of the purchase prices.

Compliance with these provisions may be waived by the Chief Registrar of Friendly Societies in the case of guarantees by government departments, public utility companies or recognised housing societies.

Grave exception to the proposals is taken by the builders, and with some justification. Taking the case of a house selling at £1000 upon which £950 is to be advanced—so far as the first five guarantees are concerned the whole of the excess £200 will have to be left in the pool and under (*c*) above will not be released for many years. It is understood that in the London area the average net profit on a reasonably built house selling at £1000 is about £80. So far, therefore, as cash is concerned the builder will be working at a loss. Admittedly the position improves after the first five guarantees but it must be some time before the builder is receiving a cash return for his outlay and in the meantime he will normally be paying about £5½ per cent on a mortgage of his property. Most builders sell under 50 houses each year, and on the figure given above the net profit on these would be £4000. But under Part II they will have to leave in the Pool, if in each case the excess advance is £200—

On the first 5 guarantees . . .	£1000
On the subsequent (say) 45 guarantees	£3000
Total .	£4000

Thus during the first year they will have obtained no return at all on their capital expenditure which will have had to be very heavy in order for them to have acquired the land and built 50 houses, and they will doubtless be paying mortgage interest. It is appreciated that the object of this part of the Bill is to protect the stability of building societies, the failure of which would be a social catastrophe which no government could permit. But

it is unfair that this should be at the expense of the building trade. The Government is presumably also concerned to discourage the profiteering jerry-builder and to encourage the genuine builder. Under these provisions, on the other hand, those builders who will suffer least are the builders who make a large margin of profit on their houses and the big financial concerns who are not unduly worried if their profits are tied up for some years: these are not necessarily the types which in the public interest should be encouraged. The genuine builder who has less financial backing but who is prepared to give the public something worth the price asked and who should be encouraged, may well be put out of business. Representations on these lines are being made to the Government with a view to persuading them to modify the proportions specified in Part II but at the time of writing it is not possible to say whether these will meet with success.

Attention must be drawn to Clause 10 (2) which provides that where a continuing arrangement has been made before the commencement of the Act, any guarantee and collateral security given pursuant to the arrangement within three months after the commencement of the Act shall be deemed to be authorised.

By Clause 3 where security is taken for any advance from any third party then before the contract to repay the advance is entered into, the society must give to the member a notice in writing in the form prescribed by the Chief Registrar of Friendly Societies (see Clause 9) stating whether the advance includes an excess advance and if so the amount thereof. If this written notice is not given no sums shall be recoverable in respect of the advance or of any security given therefor except by leave of the Court. This will apparently apply even to the enforcement of the collateral security against the builder or other third party since the clause refers to "any security given therefor (whether by the member or *otherwise*)." "Therefor" refers to "the advance" whereas the security of the third party will normally be given for the excess advance only, but the greater presumably includes the less. It might, however, be well if the intention were made clearer.

Upon the application to the Court for leave or upon an application by the member, the Court may re-open the transaction and make such order as seems just. This delegation of discretionary powers to the Court is in accordance with the trend of recent statutory legal reforms exemplified by such Acts as the Inheritance (Family Provision) Act, 1938, and the Leasehold Properties (Repairs) Act, 1938.

Where the principal sum exceeds £500 (or such other sum as is from time to time prescribed by Order in Council) the court having jurisdiction is the county court.

These provisions constitute a most desirable reform. No longer will it be possible for the purchaser to be ignorant that the builder is giving collateral and to think that the whole 90 or 95 per cent advance is being made on the house alone so that he is given an exaggerated idea of its value. Some of the building societies, of course, already take steps to see that the purchaser is fully informed. It should be noted, however, that the written notice only has to be given before the contract to repay is entered into; it need not be given before the contract to purchase is signed. Normally the two agreements are contemporaneous, but not always. The purchaser may, therefore, find himself committed to buy the house before he realises the true position. No doubt he would have a right to rescind if he had been misled by the builder as to the nature of the mortgage, but he might not realise his rights in this respect. It is submitted that it would be fairer if it were also expressly provided that where the builder has agreed either orally or in writing to arrange a mortgage for the proposed purchaser, no contract to purchase should be enforceable by the builder unless a similar written notice had been given before the contract was signed.

Miss Wilkinson's Bill contains provisions similar to Clause 3 but rendering the mortgage and collateral guarantee wholly unenforceable unless a statement as to the existence and nature of the collateral is set out in the mortgage.

Clause 4 (1) provides that where a society makes an advance to a member for the purpose of defraying the purchase price, the society shall be deemed to warrant that the purchase price is reasonable unless before the contract to repay is entered into they shall have given to the member a notice in writing stating that the making of the advance implies no such warranty. No doubt this notice will be given in all cases and here again the Bill is designed to give effect to the practice of many of the better societies who have for many years taken the precaution of giving such a notice, though it is doubtful how many purchasers have read it with understanding. Once again, the notice may not necessarily be given until after the contract to purchase is signed, and here too it is suggested that this contract should not be enforceable unless a similar notice is given before it is signed.

This question of warranties is a difficult one. Miss Wilkinson's Bill goes much further: It provides that wherever collateral

security is given, the society shall warrant that the house has been erected in an efficient and workmanlike manner, of good and substantial materials and in compliance with the local bye-laws, and that it is in all respects fit for human habitation. These warranties must be set out in the mortgage and the local authority is put under a duty of issuing a certificate setting out any matters which appear to constitute a breach.

There is no doubt that the position in the past has been unfair to the purchaser. He has often been led to suppose that the whole advance is being made on the security of the house and, as in the Borders case, exaggerated statements may have been made to him as to the society's opinion of the house. It is true that these statements will have been made by the builder and not the society, but, particularly where there is a pooling agreement, the financial connection between the builder and the society is close. In many cases, too, the society pay a commission to the builder on mortgages introduced (thus rendering the connection even closer) though this is to be rendered illegal in the future. Moreover, the building society make a survey of the house, for which the purchaser pays. It is clear, however, that at present the society give no warranties (though the builder, who may not be worth powder and shot, may do so either expressly or impliedly) and that their surveyor owes no duty of care to the purchaser. The societies object that they are not the builders and cannot be expected to guarantee the work of the latter, and that if they are to be liable to the purchaser for faulty or inadequate surveys they will have to charge the purchaser a survey fee considerably in excess of the two or three guineas at present charged. It is obvious that an adequate survey cannot be made at this price. In fact it is well known that where standardised houses are being erected the surveyors make a reasonably thorough inspection only of the first house to be finished but thereafter content themselves with seeing that the house is standing and is completed and decorated.

If an opinion may be expressed, it is suggested that to expect the building societies to enter into warranties goes too far. On the other hand, it is thought that their surveyors should be required to make their report both to the society *and to the purchaser* and in it to certify what they consider to be the true value of the house. If this would necessitate an increased survey fee most purchasers should be prepared to pay this if they realise that they would get something of real value to them. Moreover, the societies will reap substantial pecuniary benefits by the prohibition of payments of commission and they should be

prepared to give something in exchange. Such a provision would probably put the worst class of jerry-builder out of practice but would be no hardship (quite the contrary) to the genuine builder. Admittedly the Government's Bill goes some way to remedy the dangers of the present position, but not, it is submitted, far enough.

Clause 5 provides that: "Where a society has made an advance to a member upon the security of freehold or leasehold estate, it shall be the duty of the society in exercising any power to sell the estate as mortgagee thereof, to take reasonable care to ensure that the price at which the estate is sold is the best price which can reasonably be obtained; and any agreement, if and in so far as it relieves, or may have the effect of relieving a society from the obligation imposed upon it by this section, shall be void."

Provisions in pooling agreements requiring the builder to purchase from the society at a price equal to the amount outstanding on the mortgage if the borrower defaults are therefore to be definitely invalid. As previously mentioned, their legality has always been dubious. There will, however, be no objection to the builder obliging himself to take a transfer of mortgage.

Clause 6 contains the prohibition, already referred to, of the payment of gifts or commissions by a society to any person financially interested in the sale, letting or erection of the property or to any agent or servant of such person for the purpose of inducing him to introduce business to the society. Penalties of a fine not exceeding £500 in the case of the society and of a fine not exceeding £100 and/or of three months imprisonment in the case of their servants or agents are imposed for a breach of this clause.

By Clause 7 the duty is imposed on the directors of the society of seeing that the adequacy of the security is assessed by a competent, prudent and experienced person. Records have to be kept showing the valuation of the freehold or leasehold security, the name of the valuer, and particulars of any additional security. These records are to be open to inspection by the auditor or by any accountant or actuary appointed by the Registrar of Friendly Societies on the application of 10 members of the society.

Clause 8 applies to building societies s. 152 of the Companies Act, 1929, invalidating any rule relieving a director from the consequences of negligence, and s. 372 thereof, enabling the Court to grant relief to directors in certain circumstances.

The remaining clause of the Bill deals with interpretation, etc.

The excuse for this lengthy treatment of the subject is its great public importance. Nearly all houses of a value of between a few hundred pounds and two thousand pounds or more are now purchased through the building societies and almost £137,000,000 was advanced by them during the year 1937. Moreover, the growth of the building society movement has led to the purchase of houses by classes of the populace who twenty years ago would never have considered purchasing. The social importance of the subject can therefore hardly be exaggerated and the impending reforms require the most careful consideration from every point of view before they are finally put on the Statute-Book.

L. C. B. GOWER.

SOME LEGAL CONSEQUENCES OF MARRIAGE BY NATIVE CHRISTIANS IN BRITISH AFRICA

Among Britain's exports to her colonies there is an invisible one that has attracted hardly any notice, even from lawyers. It is English law. When Englishmen went abroad to found a score of colonies in the nineteenth century, they almost invariably took with them not only the common law and equity, but also "the statutes of general application which were in force in England at the time the administration was created." At the same time, lest anyone perceive in this silent process symptoms of imperial arrogance, all the early Orders in Council, using the same phrases, enjoined lawyers and judges to apply native law and custom "so far as it is not repugnant to natural justice and morality."[1]

Of the complications produced by this conflict of laws, few are more impressive than those arising from the marriage of native Christians in all parts of British Africa. Having been converted to Christianity, a varying but never negligible number of Africans, usually among the educated minority and often men of property, are married by Christian rites or, much less frequently, by civil rites.

It has been repeatedly assumed by the Courts that the consequences of such a marriage should be regulated by English and not by native law. The mere fact that the parties were Christians and contracted a Christian marriage under the local Marriage Ordinance is taken to be "sufficient to show that it was their intention that the marriage contract and all the consequences flowing therefrom should be regulated exclusively by English law."[2]

In point of fact, however, neither the parties nor the missionary who performs the marriage ceremony would normally be aware of its legal implications, as is shown by the problems afterwards presented to the Courts.

The first question that arises is whether a native already married by native custom has the right to contract a Christian marriage and, conversely, whether one married by Christian rites can marry by native custom without committing bigamy. The question is no academic one; everywhere in Africa the natives are polygamous and converts to Christianity not seldom fail to live up to the moral standards legally implied in a monogamous relation.

Legislation has partly settled the matter in most of the tropical dependencies. In Nigeria,[3] the Gold Coast,[4] Tanganyika,[5] Kenya,[6] and Uganda[7] the Marriage Ordinance provides that a person married under it (and thus by English law) shall be incapable of contracting a valid marriage under any native law or custom. It is not clear if a marriage according to native custom is dissolved by a subsequent Christian marriage.

[1] For the references, see my article on "The Recognition of Native Law and Custom in British Africa" in *Journal of Comparative Legislation and International Law*, February, 1938.

[2] *Cessario* v. *Goncallo*, 1 Nigerian L.R. 41, distinguishing *Cole* v. *Cole*, 1 Nigerian L.R. 15.

[3] Laws, Cap. 68, s. 35.

[4] Laws, Cap. 105, s. 44.

[5] Laws, Cap. 92, s. 35.

[6] Laws, Cap 167, s. 36.

[7] Laws, Cap. 103, s. 37.

In Southern Rhodesia a marriage by native custom of a person previously married in church was held to be bigamous.[8] In Sierra Leone a marriage by native custom is, however, not recognised as a marriage which can lead to a charge of bigamy.[9]

These provisions imply a recognition that marriage by native custom is itself no less valid than Christian marriage. Perhaps they reflect the changing view that English law is taking of polygamous marriage as a foreign custom. It is still difficult to say how far the rigid view adopted seventy years ago in the classic case of *Hyde* v. *Hyde* would be maintained to-day, for the Judicial Committee of the Privy Council has certainly recognised the validity of polygamous marriages in countries where they are lawful, and it has upheld rights based on them.[10]

In South Africa, on the contrary, the Courts have in the past refused to recognise marriage by native custom on the ground that a polygamous union is repugnant to Christian standards or civilised principles.[11]

They have withheld recognition whether the native had in fact taken a second wife or not.[12] Incidentally, these decisions were made in dealing with the question whether the evidence of a native woman, married in accordance with native custom, is admissible against the man. That depends on whether she is to be regarded as his lawful wife. If she is, the evidence is not admissible; if she is not, then it is. Yet in British colonies where native polygamous marriages are recognised, the evidence of a woman so married has been admitted against the man.[13]

Subsequent legislation in South Africa has, however, drawn a clear distinction between marriage, i.e. under the common law (which is Roman-Dutch), and "customary unions," i.e. marriages according to native custom, which are now implicitly recognised.[14] During the subsistence of a customary union, a native may contract a marriage, which apparently has the effect of dissolving the customary union; but a native who is married may not contract a customary union without running the risk of prosecution for bigamy.[15]

It follows from the fact that a marriage by Christian rites is a marriage under the common law that a native thus married can be divorced only on the grounds available under common law or statute.[16] But the statutes are only those "of general application which were in force in England" at the date when the Administration of the new colony was created. Subsequent statutes do not automatically apply to the colony. The wider grounds of divorce established by the Matrimonial Causes Act, 1937, will therefore not be available in Africa until such time as similar legislation may be passed in any colony itself.

What effect has Christian marriage on the property of the spouses? This question often arises and in several dependencies legislation has attempted to answer it.

[8] *R.* v. *Kaodza*, [1912] S.R.6.
[9] Christian Marriage Ordinance, 1924 (Cap. 25), s. 16.
[10] See an article by W. E. Beckett on "The Recognition of Polygamous Marriages under English Law" in *Law Quarterly Review*, July, 1932.
[11] *Nalana* v. *Rex*, [1907] T.S. 407. Cf. *Seedat's Executors* v. *The Master*, [1917] A.D. 302, especially at p. 308.
[12] *R.* v. *Mboko*, [1910] Transvaal S.C., 445.
[13] *R.* v. *Robin*, 12, Kenya L.R. (1929), 134 and *R.* v. *Mwakio Asani*, 3 Tanganyika L.R. (1931–4), 66.
[14] Native Administration Act, 1927, as amended in 1929, s.22.
[15] In Natal it is definitely bigamy under Law No. 46, 1887, s. 13.
[16] *Ellen* v. *Jim*, [1931] S. Rhodesia L.R., 118.

In the Gold Coast a curious compromise prevails and one does not envy the official whose duty it is declared to be to explain to natives who are about to marry the following provisions[17] in regard to succession in case of intestacy—

"The personal property of such intestate, and also any real property of which he might have disposed by will, shall be distributed or descend in the following manner, viz.—

"Two-thirds in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates in force in England on the 19th November, 1884, any native law or custom to the contrary notwithstanding: and one-third in accordance with the provisions of the native customary law which would have obtained if such person had not been married under this Ordinance. Provided—

"(1) That where by the law of England, any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the Crown, such portion shall be distributed in accordance with the provisions of the native customary law, and shall not become a portion of the said casual hereditary revenues;

"(2) That real property, the succession to which cannot by the native customary law be effected by testamentary disposition shall descend in accordance with the provisions of such native customary law, anything herein to the contrary notwithstanding.

"Before the registrar or a marriage officer issues his certificate in the case of an intended marriage, either party to which is a person subject to native law or custom, he shall explain to both parties the effect of these provisions as to the succession of property as affected by marriage."

In Sierra Leone it is provided[18] that a Christian marriage, to which one of the parties is a native, "shall not have any effect on the property of such natives: Provided that nothing herein contained shall have the effect of preventing the parties to such marriage from coming to an agreement with respect to the control and enjoyment of their respective properties or of preventing such parties from disposing, by legal procedure and means, of their respective properties after their respective deaths.

"The property of parties to a marriage celebrated under this Ordinance shall, if both be natives, be subject in all respects to the laws and customs of the tribe or tribes to which the parties respectively belong."

In Nyasaland a marriage by Christian rites does "not alter or affect the status of the parties or the consequences of any prior marriage entered into by either party according to native law or custom or involve any other legal consequences whatever."[19]

In South Africa it is now provided[20] that, "during the subsistence of any customary union, no marriage shall in any way affect the material rights of any partner of such union, or any issue thereof, and the widow of any such marriage, and any issue thereof, shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union."

But during the subsistence of a customary union, no native can marry

[17] Marriage Ordinance (Cap. 105), 1909, as amended in 1935, s. 48.
[18] Christian Marriage Ordinance, 1924, Cap. 25, s. 26.
[19] Native Marriage (Christian Rites) Ordinance (Cap. 82), 1923, s. 3.
[20] Native Administration Act, 1927, as amended in 1929, s. 22.

unless he has first declared on oath before the magistrate or native commissioner of the district in which he is domiciled, the nature and amount of the movable property (if any) allotted by him to his wives and children under the customary union.

It is further provided[21] that all movable property belonging to a native and allotted by him or accruing under native law or custom to any woman with whom he has lived in a customary union, shall on his death devolve and be administered according to native law and custom. All other property of whatsoever kind shall be capable of being devised by will.

In Natal it had indeed long ago been enacted that no marriage between natives should "remove the parties from the operation of native law, either in their persons or their property."[22]

In Southern Rhodesia it has been enacted[23] that Christian marriage "shall not affect the property of the spouse which shall be held, may be disposed of, and unless disposed of by will shall devolve according to native law and custom."

This provision clearly contemplated that the property of a native dying intestate should devolve according to native custom, but that such property might be distributed otherwise in accordance with a will made by a native. Although the right to make a will is not known to native law, one is sometimes made by a native who has been influenced by European ideas, especially after he has acquired rights or interests unknown to native law or custom. Where a claim was based on such a will, it was contested on the ground that a native could not by will vary the distribution of his property according to native law. Another complication was the fact that the property in question was land, individual ownership of which was also unknown to native law. The Court held[24] that native law cannot serve as a guide in determining succession to property, the ownership of which was unknown to the native social structure. This was the decisive factor. Such ownership must be governed by the ordinary law of the land, and Section 13 of the 1917 Ordinance (quoted above) did not apply to it.

That this decision must not be taken to mean that a consequence of Christian marriage is inevitably the full application of the common law to the rights of the parties, was emphasised in the following year. A passage from the judgment in the case[25] sufficiently indicated the prevailing confusion. "There are exceptions of course in the application of native law. . . . Various incidents of a civilised marriage have been applied to natives inconsistent with native law and custom. Such are the emancipation of a woman on marriage from the power of her guardian (*Rex* v. *Gutayi*, [1915], S.R. 49), the incidents of claiming damages for adultery (*Iden* v. *Philemon*, [1918], S.R. 140), the repudiation of the wife by the husband (*Sikwela* v. *Sikwela*, [1912] S.R. 168), and the power of the Court to deal with the custody of the children (*Dayimano* v. *Kgaribaitse*, [1931] S.R. 134). But in the case of *Duma* v. *Madidi*, [1918] S.R. 59), the native law of inheritance and guardianship was enforced, and in *Chiduku* v. *Chidano*, [1922] S.R. 55) the law of guardianship according to native custom was also enforced. In the latter case, Tredgold, S.J., expressed the view, with which I agree, that native customs should not be interfered with unless they inherently

[21] *Ibid.*, s. 23.
[22] Law No. 46 of 1887, s. 11.
[23] Native Marriage Ordinance, No. 15, of 1917, s. 13.
[24] *Komo and Leboho* v. *Holmes*, [1935], S. Rhodesia L.R. 86.
[25] *Vela* v. *Mandinika and Magutsa*, [1936] S. Rhodesia, L.R. 171.

impress us with some abhorrence, or are obviously immoral in their incidence. The case of *Komo* v. *Holmes*, then, must be confined strictly to its subject-matter, which is the ownership and devolution of immovable property, a matter which falls outside the purview of native law and custom."

Recent legislation[26] has attempted to clarify the position by simply depriving natives of the benefits of "the statute law of the colony relating to the age of majority, the status of women, the effect of marriage on the property of the spouses, the guardianship of children, or the administration of deceased estates." The object of this enactment is apparently to restore native law and custom in those spheres and to prevent the Courts from exercising their discretion as in *Komo* v. *Holmes*.

The conclusions that emerge from this summary survey seem to be these. The rule that, in the absence of legislation, Christian marriage automatically involves the application of English (or Roman-Dutch) law, produces a crop of problems. Of these the worst is the case of the native who is partly Europeanised in his habits, and to whom the inflexible application of either native law or European law is likely to cause serious hardship. The legislation designed to deal with either the rule or its consequences varies widely from one colony to the next. Even neighbouring territories have treated the same problem quite differently and without consulting each other's experience.

A desirable rule to be followed in the difficult cases of natives who are partly Europeanised was laid down in an old leading case[27] in Nigeria—

"The Court is not bound to observe native custom in *every* case where the custom is not repugnant to natural justice, etc., nor incompatible with any local Ordinance. When the Court has before it a matter which is purely 'native,' or where all the circumstances to be taken into account are connected with native life, habit, or custom, then, undoubtedly native law and custom should apply. Where, on the other hand, the matter before the Court contains elements foreign to native life, habit, and custom, the Court is not bound to observe native law and custom."

In present circumstances it is obviously unwise for legislation to fetter the discretion of the Court in such cases.

JULIUS LEWIN [28]

[26] Native Law and Courts Act, No. 33, of 1937, s. 3.
[27] *Cole* v. *Cole*, [1898] Nigerian L.R., Vol. 1, p. 15.
[28] Lecturer, University of Capetown.

STATUTES

Inheritance (Family Provision) Act, 1938

In view of the thorough consideration given to the subject-matter of this Act in Volume I of this Review at page 296 (to which the reader is referred), it will be sufficient here briefly to summarise its effect.

The Act does not come into operation until the expiration of one year from the date of its passing (13th July, 1938), and only applies to a person who dies domiciled in England after the passing of the Act, and who leaves a will. In such a case the Court has power to order payment of reasonable provision out of the net estate of the testator for the benefit of (*a*) a surviving spouse, (*b*) a son who is an infant or by reason of some mental or physical disability incapable of maintaining himself, or (*c*) a daughter who has not been married or who is under such a disability. An order may be made if the Court is satisfied that the will does not make reasonable provision for the maintenance of that dependent and can be subject to such conditions or restrictions as the Court may impose. But no application can be made to the Court for the exercise of the power if not less than two-thirds of the income of the net estate has been bequeathed to a surviving spouse and the only other dependents are children of the surviving spouse. Moreover, unless the net estate does not exceed £2000, the provision for maintenance can only be by way of periodical payments of income which must terminate not later than remarriage in the case of a surviving spouse, marriage or the cesser of the disability (whichever is the later) in the case of a daughter, and attainment of full age or cesser of the disability (whichever is the later) in the case of a son, or, in any case on the death of the dependent. Further, the amount of the annual income applicable for the maintenance of dependents at any one time is not to exceed two-thirds of the annual income if the testator leaves a spouse and one or more dependents, or one-half if the testator does not leave a spouse or leaves a spouse and no other dependents (s. 1 (3)).

Where the total net estate does not exceed £2000 the Court may order provision in whole or in part by payment of capital but the Court in determining the amount shall give effect to the principle of s. 1 (3) *supra*.

In the exercise of its discretion the Court is to have regard to the nature of the testator's property and is not to order a provision which would necessitate an improvident realisation of the property, and is also to take into consideration the testator's reasons, so far as ascertainable, for making the dispositions contained in his will. The Court may accept such evidence of these reasons as it considers sufficient, including any statement in writing signed by the testator and dated, but in estimating the weight to be attached to this statement the Court is to have regard to all the circumstances. This provision as to evidence is not entirely clear. The commencement at first sight appears to provide that the Court may have regard to any evidence whether or not this would be admissible under ordinary principles of the law of evidence. The latter part, however, suggests that statements by the testator are not admissible unless in writing and signed and dated.

By s. 2 of the Act an application to the Court must be made within 6 months from the date on which a general grant of representation is taken out and a "dependent" under the Act is deemed to be a person interested in the estate for the purpose of obtaining a grant of representation.

Where an order is made the will is deemed for all purposes (*including*

death duties) to have had effect from the testator's death as if it had been executed with the variations specified in the Order, and the Court may make consequential directions for the purpose of giving effect to this order. An office copy of the order is to be sent to the principal probate registry and a memorandum of it is to be endorsed on the grant of representation.

Notwithstanding s. 2, after the expiration of the 6 months period an application may be made for an order varying a previous order on the ground of material non-disclosure or substantial change of circumstances, or for an order making provision for the maintenance of another dependent, but such an order can only relate to property the income of which is at the date of the application applicable for the maintenance of a dependent.

For the purposes of the Act "son" and "daughter" include a legally adopted or posthumous child. But an illegitimate child is not included.

The Act, which is obviously of first-rate importance both legally and socially, follows the same general lines as legislation in other parts of the British Empire (for a comparative survey of the New Zealand legislation, see the note in Vol. I, p. 296) and no doubt the principles enunciated in the decisions of the Courts of the Dominions will be found useful by the Courts of this country. But so far as English Law is concerned, the Act represents an entirely new development, and it differs from the corresponding legislation in the Dominions in that the discretion which it confers upon the Court is very severely limited. It might have been better if the Legislature had been prepared to place a little more trust in the common-sense, fairness, and intelligence of the Judges; on the other hand, it must be admitted that the attitude adopted by some judges towards certain recent reforming legislation is not best qualified to encourage such trust.[1] In any case, the limitations imposed may have the desirable effect of securing uniformity in the exercise of the discretion. It remains to be seen what use will be made of the Act, what effect it will have on family life, and whether it will result in a diminution of the most unpleasant actions to set aside wills on the grounds of insanity and undue influence or whether it will add to or substitute for these another opportunity for washing dirty linen in public.

The above is merely a summary of the provisions of the Act and the reader is referred once more to the notes in Volume I and to the terms of the Act itself.

REPORTS OF COMMITTEES

Report by the Committee of the International Chamber of Commerce on the Legal Treatment of Foreign Companies

The business man's most effective reply to a prohibitive tariff is to produce behind the tariff wall, and mounting tariffs throughout the world have resulted in the setting up of branches and subsidiaries of companies in one country in the territories of foreign countries. "Tariff barriers," it has been said[1a], "have had the paradoxical effect of discouraging the export of commodities only to stimulate the exportation of factories." This trend has given enhanced importance to the question of the legal

[1] On the other hand, it is clearly the modern tendency of reforming legislation to confer a discretion (more or less limited) on the Courts. See also the Leasehold Property (Repairs) Act, noted in *Modern Law Review*, Vol. II, p. 160.

[1a] P. Baudouin-Bugnet, "Fair Play for Foreign Companies," *World Trade*, Vol. X, No. 3, p. 7.

and fiscal status of companies and their subsidiaries in foreign countries. Unfortunately nationalist sentiment which is playing so dominant a rôle in post-War Europe has found expression, not only in the exclusion of foreign products, but also in a shortsighted policy of placing difficulties in the way of setting up branches and subsidiaries of foreign companies in the national territory.

This subject has in recent years been the subject of careful investigation by an expert committee of the International Chamber of Commerce. As a result of this investigation the International Chamber has produced a Draft Model Bilateral Agreement[2] designed to facilitate the setting up and operation of subsidiaries and branches in foreign countries. It is not only in the sphere of foreign affairs that collective bargaining has proved abortive and the Chamber recognises that the method of bilateral negotiation holds out most hope of material progress. The Draft, therefore, is intended to serve as a basis for bilateral agreement between one government and another.

The first difficulty which had to be faced was to establish a criterion for determining the "nationality" of companies for the purposes of the agreement. Two alternatives were propounded. In the first place, there was the criterion of the situation of the legal seat (i.e. where the company is registered or where its bye-laws declare it to be constituted, etc.). This criterion was rejected as being open to abuse[3], since a company might attempt to set up a fictitious seat in order to benefit by more favourable treatment. The second alternative was the situation of the "principal establishment." The difficulties in this case were of a strictly practical kind. In the case of a large undertaking it may be difficult to determine the location of its "principal establishment" in the sense of principal centre of operations.

The solution adopted by the Committee is to propound a definition as a model which may, nevertheless, be varied as a result of negotiations between the High Contracting Parties with special reference to their own legal systems.

For the purposes of the agreement all associations of persons and/or capital[4] having their seat in the territory of one of the High Contracting Parties and doing business legitimately for profit are deemed to be companies of that Party by the other High Contracting Party[5]. The seat for this purpose is "the place where the real centre of management is "situated."[6] This in effect is the criterion adopted by the English Courts for determining the domicil or, to be more accurate, the quasi-domicil of corporations[7]. It is a question of fact in any particular case where the real control is exercised. Of this doctrine Lord Atkinson has said[8]—

> "If the true rule be that the residence is where 'the central management and control abides' then, unless a thing can have two or three different and separate centres, it would appear to me to be quite impossible, according to the ordinary use of language, that 'the central control and management' can at the same time abide in two or more different places."

[2] *Ibid.*, pp. 8–10.
[3] Draft Agreement, Art. 2, Commentary.
[4] Thus the word "company" as used in the agreement is not confined to associations which constitute a company according to English law.
[5] Draft Agreement, Art. 1.
[6] *Ib.*, Art. 2.
[7] *Cesena Sulphur Co.* v. *Nicholson* (1876), 1 Ex.D, 428; *cf. Egyptian Delta Land & Investment Co.* v. *Todd*, [1929] A.C. 1, 19.
[8] *Swedish Central Railway Co.* v. *Thompson*, [1925] A.C. at p. 508.

Dr. Cheshire, in the first edition of his work on Private International Law[9] concedes that the logic of this argument is unanswerable. It is true that later cases have introduced some uncertainty into this doctrine. But these cases have been concerned with *residence* for specific purposes. Thus for purposes of jurisdiction[10] and for the purposes of the Income Tax Acts[11] a corporation may be regarded as resident in two or more places. "But the fact remains," says Dr. Cheshire[12], "that if it is necessary to determine the domicil of a corporation as distinct from its residences the place of central control furnishes a reasonable and comparatively simple test." In the same way the criterion suggested in the Agreement does provide a certain and unambiguous standard, whatever refinements it may be necessary to consider in questions of jurisdiction or taxation. In the *Cesena Case*, for example, the company was incorporated under the Companies Act (though later registered in Italy) for the purpose of taking over and working sulphur mines at Cesena in Italy. The practical business of manufacturing and selling the sulphur was administered by an Italian delegation including the managing director who was permanently resident at Cesena. No products were ever sent to England, the books and accounts were kept in Italy, and two-thirds of the shareholders were resident Italians. So far it appeared that the centre of *business* was in Italy. But the articles of association showed that the objects of the company included the acquisition and working of sulphur mines, not only in Italy, but at any place where sulphur was likely to be found. There was a Board of Directors which met in London and which had "sole order, direction and management" of "the working of the company's mines, the mode of disposition thereof, and the general business of the company." Shareholders' meetings were held in London and it was there that the dividends were declared. Here, then, the effective administrative control was in London and the company would be an English company within Arts. 1 & 2 of the Draft Agreement. With this case we may usefully compare the case of *Swedish Central Railway Company* v. *Thompson*[13] which decides that, for purposes of income tax a company may have more than one residence. A company was formed in England in 1870 with the object of constructing and running a railway in Sweden. In 1900 it leased the railway to a traffic company for 50 years at an annual rent of £33,500 payable in England. In the same year the articles of association were altered so as to remove the control and management of the business to Sweden, and after that time the general meetings of the shareholders (who were mostly Swedish) and the meetings of directors were held at Stockholm. Dividends were declared there, and no profits were transmitted to England except in the shape of dividends to English shareholders. On the other hand a committee which met regularly was appointed in London to deal with transfers of shares in the United Kingdom, to attach the seal to share certificates and to sign cheques on the London banking account. By a majority decision the House of Lords held that a company is capable of a dual residence for income tax purposes and that the company in this case was sufficiently resident in this country to be assessable for income

[9] At pp. 124, 125.

[10] *Carron Iron Co.* v. *Maclaren*, 5 H.L.C. 416, 449; *New York Life Insurance Co.* v. *Public Trustee*, [1924] 2 Ch., at p. 120.

[11] *Swedish Central Railway Co.* v. *Thompson*, [1925] A.C. 495.

[12] *Op. cit.*, 2nd ed., p. 204.

[13] *Supra.*

tax. Nevertheless, no difficulty arises in applying to this case the definition in the Draft Agreement. It was admitted that the controlling power of the business was in Sweden, the real centre of management was there, and for the purposes of the Agreement it would be a Swedish company.

Companies of each of the High Contracting Parties so defined have the right to do business in the territory of the other High Contracting Party by setting up branches and/or subsidiaries subject to the same authorisations and conditions as shall be required for companies of that Party[14], and in no case shall the "nationality" of the company affect the grant of the authorisations demanded.

Such branches and subsidiaries when established have the same rights and powers as similar national undertakings subject, of course, to compliance with the national law. In particular, it is provided that they may appear in Court as plaintiffs and defendants, acquire land and buildings, participate in public tenders and be concessionaries of public services.[15] This provision cannot be read without qualification. In the first place, presumably, a branch or subsidiary would not be able to appear as plaintiff or defendant in legal proceedings unless it was an entity endowed with legal personality. Secondly the general power to acquire and hold land must be read subject to the earlier paragraph which equates the legal position of subsidiaries and branches with that of national undertakings. Read literally and without this qualification the article might have the effect of putting such branches and subsidiaries in a privileged position in this respect.

Tenders for supplies or concessions of importance to national defence "properly so called" may be reserved at the discretion of each of the High Contracting Parties[16]. This clause will be a fertile source of controversy. It is obviously very difficult to say in modern conditions where national defence—even "properly so called"—begins or ends. Nevertheless, the functioning of an agreement on these lines must always depend upon a strict adherence to the spirit of its provisions and on a spirit of mutual co-operation in the interpretation of its terms.

Articles 6 and 7 define the terms "branch" and "subsidiary." A branch must satisfy the following conditions—

1. It must be a permanent establishment, a term which includes the installation and fixed places of business of an enterprise, such as mines, oil-wells, plantations, factories, workshops, warehouses, offices and agencies. It does not include an agent of genuinely independent status, as a broker, commission agent, etc., but it does include an agent who is (*a*) a duly accredited agent (*fondé de pouvoirs*) who habitually enters into contracts for the enterprise for which he works, and (*b*) is bound by an employment contract and habitually transacts commercial business on behalf of the enterprise in return for remuneration from it, and (*c*) is habitually in possession of goods belonging to the enterprise, if this is implied by the nature of the trade or industry in question[17].

2. It must be without separate legal personality.

3. It must be directly dependent financially and/or administratively on a company of the other High Contracting Party. It is doubtful whether

[14] Art. 3.
[15] Art. 4.
[16] *Ibid.*
[17] *Cf.* Protocol, League of Nations Draft Convention for Allocation of Business Income between States for purposes of Taxation, C. 252. M. 124, 1933, II, A. See *World Trade, ubi supra*, p. 9.

the alternative form would do since if the dependence were financial only then the questions might arise as to whether the "seat" of the business was not in the country where the so-called "branch" operates.

4. It must have the same—or having regard to difficulties of translation, substantially the same—description as the principal company.

5. Its activity must be within the limits of the objects of that company.

6. It must be under the direction of an appointee of the parent company, with powers to represent it and contract on its behalf.

"Subsidiaries" are defined as companies situated on the territory of one of the High Contracting Parties which, although having a separate legal existence and property, with separate management and direction, are nevertheless subordinate financially and/or administratively and/or technically to one or several Companies situated on the territory of the other High Contracting Party. The same caveat to the alternative form must be entered here as is suggested in (3) above.

Articles 8 and 9 attempt to prevent restrictions based on the nationality of founders, directors, shareholders, partners, or employees in the undertakings concerned. Technical specialists and executive staff of the nationality of the parent company may be employed without restriction. As regards employees of a third nationality, branches or subsidiaries of a foreign company must conform to the laws in force in the state where they operate. Nationality of course cuts across the boundaries of race and it may be found impossible to negotiate with the authoritarian states on the basis of nationality. This consideration probably dictated the proviso that the only exceptions admitted to these articles are those based on public policy or the security of the State.

Article 10 provides that no restrictions shall be placed on the transfer from the country of one of the High Contracting Parties to that of the other of monies resulting from profits made or capital invested in their subsidiaries or branches by the companies of each of the High Contracting Parties in the course of business done in the territory of the other High Contracting Party. In present conditions, having regard to the rigid exchange controls operated by a number of countries, this provision can be no more than a pious hope for the future.

Article 11 contains a general prohibition of fiscal discrimination, and articles 12 & 13 provide for consultation between the parties and for a time limit for the operation of the Agreement.

E. WYNDHAM WHITE.

Report of the Committee on Repair of Premises damaged by Hostilities[1]

Space does not permit of a detailed examination of the recommendations of the Committee, which include in a Schedule a Scheme in a form similar to a draft Bill. Accepting the basis, on which the Committee has proceeded, the report is nothing if not thorough, but its recommendations appear to fall largely into three groups, namely, first, the relations between landlord and tenant where the head lease is not a building lease at a ground rent; secondly, the same relations where there is only a ground rent; and thirdly, the relations between mortgagor and mortgagee. Other rights included in the report are those associated with fee farm rents, mining leases, agricultural leases, settled property and ecclesiastical property.

[1] Cmd. 5934, printed by H.M. Stationery Office. Price 6d.

Although a scheme is recommended, others are shortly discussed and dismissed as unsatisfactory.

The basis upon which the Report proceeds is that there can be no form of insurance against war risks. The companies have already excluded these risks and it is assumed that in view of the uncertain character of the extent of risk the Government is not willing to assist in a manner similar to that already announced in connection with shipping. Faced with this position the Committee have sought to find a *via media* for the regulation of the rights of individuals so that the loss, if any, arising from destruction of buildings shall fall upon the person designated independently of contractual obligation. It may be emphasised at the outset that the recommendations are intended to apply independently of the date of the creation of the rights and of any express contract to the contrary.

Regarded as a piece of social legislation it is interesting because the State is apparently prepared to disclaim responsibility for loss arising from circumstances affecting, and in the interests of, the whole community but is willing to determine the rights of private persons despite their contractual obligations. This seems to carry State interference to considerable lengths but is justified on the ground that lessors and lessees and mortgagors and mortgagees are not strictly upon terms of equality. If this principle is sound, and every practical lawyer must have some sympathy for it, it may justify other interference than that already attempted apart from such exceptional circumstances as war risks.

The distinction drawn between the three principal classes mentioned above appears to be as follows. Where the lease is not at a ground rent the property virtually belongs to the lessor and provides him with his income by way of rent, hence if the property is destroyed the loss should fall upon the lessor and not upon the lessee, who by disclaimer can get rid of liability not only to repair but also for payment. Where the lease is at a ground rent the building primarily belongs to the lessee and the site to the lessor. The lessee is, therefore, to bear the loss of the building but to continue liable to pay rent and otherwise observe the covenants apart from the covenant to repair. The lessor may lose any enhanced value of the site by the loss of the building. The position of mortgagors and mortgagees is somewhat different, and is more analogous to that arising from the grant of a fee farm rent. The mortgagee has only a security and therefore has no property strictly to destroy. The mortgagor is to be relieved of his liability to repair, but the obligation to repay remains unimpaired. Similarly the owner of a fee farm rent retains his right to rent but is not to be able to compel repair of premises. Here the loss will in fact fall upon the owner of the property if he is otherwise solvent and upon the lender or owner of the rent, if he is not. It should be added that this short and blunt statement of the recommendations hardly does justice to the modifications and safeguards which are added to the Report, as, for example, the suggestion that leave to apply to the Court to disclaim might be given to lessees where the rent is more than the site value of leases at a ground rent. There are also important questions of discretion to be exercised by the Courts.

We have selected this method of statement, however, to bring out what we believe to be the essential feature of these recommendations. The substantial owner of property is to bear the risk of loss by war risks and is not to be able by contract to escape from this liability. In fact it places the owner of property that is let in an analogous position to that of the

occupier owner. Why the mortgagee should be exempted from loss, except by the insolvency of his debtor, is not equally clear. The mortgagor, if anything, has more at stake than anyone else, since the destruction destroys more than his asset since it increases his liability. This seems to be an extension of the principle.

If this principle is sound, namely, that a war waged on behalf of the community should entail specific risks to property owners it is right that it should be considered as a whole and not with regard to one form of property only. Housing a community is almost as essential as feeding it and possibly more important than transporting it. Owners of land differ from owners of movable property in that they cannot protect it by removal. If anything, therefore, property owners should receive a special measure of consideration. In fact, they are to be told that nothing they can do will lessen a risk which they must bear. So soon as their property ceases to fulfil its function in part or whole (as in the case of flats or workrooms) such loss in part or whole is to be borne by them. We would like to know whether similar rules are to be laid down, for example, with regard to vehicles used in transport and irrespective of agreements for maintenance and repair. Again, upon whom is to fall the loss for property held under a hire-purchase agreement?

In our view the matter before this Committee was too limited in scope. If the legislature is to interfere in such a matter with the contractual obligations of individuals, and probably interfere it must, then such interference should be based upon some general principle clearly ascertained and applied to property rights generally. No doubt there is a general principle of the Common Law affecting damage done by Act of God or the King's Enemies that the loss should fall where it lies, but this principle is based on the Common Law which generally preserves the freedom of contractual obligation. The legislative action proposed is a restriction upon Common Law principles except in so far as it may plead "public policy." If such restriction is based upon "public policy" then such "public policy" should be defined. Having been defined it should, as the Common Law is, be applied generally.

H. POTTER.

NOTES OF CASES

Private International Law : Contracts

English Private International Law has entered what future legal historians may call one of its formative stages. The great decision of the House of Lords in *R.* v. *International Trustee*, [1937] A.C. 500, and the judgment of the Privy Council in *Mount Albert Borough Council* v. *Australasian Temperance Society*, [1938] A.C. 224, are milestones on the road towards a systematisation of the rules of conflict of laws applying to contracts. They are even surpassed in importance by the recent decision of the Privy Council in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* (*in liquidation*), [1939] 1 All E.R. 513. This case is the greatest contribution to clarity in this field which the Courts have made for a long time and it is incidentally of outstanding commercial importance. It was a decision rendered by the Privy Council as the highest Court for the Province of Nova Scotia. Yet, there can be no doubt that it has a fundamental effect on English Private International Law.

The defendants were a company incorporated under the laws of Nova Scotia. They were the owners of a ship in which a cargo of herrings was consigned from a Newfoundland port to the plaintiffs, a company incorporated in New York. The plaintiffs were at all material times the owners of the cargo and holders of bills of lading issued on behalf of the defendants in Newfoundland. They sued the defendants for damages on the ground that the cargo had been injured in transit through the negligence of the master. The bills of lading contained a clause relieving the shipowners of liability for loss due to the negligence of their servants. They also contained a provision to the effect that they should be subject to the terms and provisions of, and exemptions from liability contained in, the Canadian Water Carriage of Goods Act, 1910, and specially incorporated a clause of that Act which declared illegal, null and void any clauses exempting shipowners from liability save in accordance with the provisions of the Act. Finally, the bills of lading expressly provided that "this contract shall be governed by English law." In 1932, there came into force in Newfoundland the Carriage of Goods by Sea Act, which embodies the Hague Rules in a Schedule and is virtually identical with the English Carriage of Goods by Sea Act, 1924. S.-3 of the Act, like the analogous section of the English Act, provides that every bill of lading or similar document of title issued in Newfoundland which contains a contract to which the Rules apply shall contain an express statement that it is to have effect subject to the Rules. When the bills of lading were issued by the defendants' representative he inadvertently used old bill forms which did not contain the reference to the Hague Rules.

It was this latter fact which gave rise to the dispute. The plaintiffs contended that the bills of lading, as they did not comply with the provision in s. 3 of the Newfoundland Act of 1932, were illegal according to the law of Newfoundland, and that on this ground the exemption clause in the bills could not operate in favour of the defendants. The Nova Scotia Courts rejected this contention and gave judgment for the defendants. The Judicial Committee affirmed the decision of the lower Courts. The problem whether the bills were illegal by the law of Newfoundland, i.e. the *lex loci contractus*, and, if so, whether this illegality could affect a contract, expressly subjected to English law, and now the object

of litigation in the Courts of Nova Scotia, gave Lord Wright who delivered the judgment an opportunity of elucidating some of the most fundamental problems of Private International Law.

I

The first question to be decided was: What was the proper law of the contract? The parties had agreed that the contract was to be governed by English law. Yet, there was no visible connexion between the subject-matter of the contract and England. Were the parties to a contract of carriage of goods from Newfoundland to New York at liberty to choose English law as the proper law of their contract, though neither of them was an English company? Was such a choice "to be taken seriously"? In legal theory the question is highly controversial, as to whether the parties to an international contract are free to choose whatever law they like, or whether there must be a "real connexion" between the contract and the law chosen. This question is answered in an unambiguous way by Lord Wright. According to the Private International Law of Nova Scotia, which can be taken to be identical with that of England, the "autonomy" of the parties is not so restricted. This is at least the case if the parties choose English law as the proper law.

This rule which has never before been laid down by the Courts is of very great practical importance indeed. It is an expression of a tendency which may be called "the expansion of English commercial law." In view of the fact that mercantile transactions all over the world are insured and financed in the City of London English commercial law has become of world-wide importance even in connexion with transactions which do not touch England at all. A parallel development can be found in those rules which extend the application of "English Maritime Law" to collisions on the high seas, wherever they happen and whatever are the countries to which the vessels concerned belong. The gradual elimination of the law of the flag and its replacement by the law which the parties may be deemed to have intended to govern their maritime contract works in the same direction. Lord Wright observes in his judgment that English arbitration clauses are contained in many foreign contracts of sale, that the underwriters of a cargo like the one forming the subject-matter of the present dispute are likely to be English, that the parties are likely to be familiar with English commercial law, and finally that an Imperial Statute, the Merchant Shipping Act, governed the transactions. All these points tend to show that the rule thus evolved by the Court is a corollary of the attraction which English law increasingly exercises on foreign commercial transactions. The favour thus shown to a choice of English law cannot have been uninfluenced by the fact that the rule now laid down is likely to lead to an application of English law by an English judge.

Though it is not necessary that there should be any real connexion between the law chosen and the contract itself, the "autonomy" of the parties cannot be entirely unfettered. Lord Wright mentions two possible restrictions. One is that the intention expressed must be *bona fide* and legal, the other that there must be "no reason for avoiding the choice of law on the ground of public policy." These two restrictions are quite different. The first refers to the act of selection, the second to the result to which the selection leads. If the choice of law is disregarded because it was not *bona fide* and legal, the Court refuses to apply the foreign law not on the ground that it is in any way objectionable, but because the

parties selected the foreign law in an illegal way. This exception seems to introduce into English law for the first time the French notion of *fraude à la loi*, the principle that if the facts of the case have been connected with a system of law by way of evasion, that foreign law will not be applied. The second qualification, however, suggested by Lord Wright, is the well-known principle of public policy. Foreign laws which shock the conscience of an English Court will not be applied in this country. Thus, the first of the two qualifications may lead to a refusal by the Court to apply English law if the choice of English law was made *mala fide*, but the second restriction can never operate where the law selected by the parties is English law itself.

II

The bills of lading, which had thus been submitted to English law by the parties, mentioned the Canadian Water Carriage Act, and it was alleged by the plaintiffs that this constituted a reference to Canadian law which invalidated the selection of English law as the proper law of the contract. This contention was rejected, but it gave Lord Wright an opportunity of explaining in very clear terms the difference between reference to a foreign system of law and incorporation into a contract of a provision or provisions belonging to a foreign system. The parties to any contract, domestic or international, may use a foreign enactment as one of the terms of their contract. Instead of setting out in full the terms of a foreign code they may mention the provisions of that code and in that case it is just as if they had verbally copied the provisions in their agreement. This does not mean that the foreign law, some of the provisions of which are thus incorporated into the contract, is made the proper law of the contract. In the present case the parties had not submitted to Canadian law. They had only incorporated one Canadian statute, the Water Carriage Act, instead of setting out the provisions of that Act in full. The difference between this "shorthand" way of expressing contractual terms and submission to a foreign law is clearly seen, when, as in the present case, the law changes between the time of the making of the contract and the moment when the case comes before the Court. When the present case came before the Courts of Nova Scotia the Canadian Water Carriage Act had been repealed. This would have been of importance if the parties had submitted to Canadian law as a whole, but in a case of incorporation, where the foreign enactment is nothing but a term of the contract, its repeal cannot affect its contractual operation. The rule that the parties may incorporate foreign provisions in their contract was treated by Lord Wright as a rule of English Private International Law. It may, however, be argued that it is in fact a rule of English municipal law which permits this shorthand expression of contractual terms. That the difference between reference and incorporation is of very great commercial importance indeed is mentioned by Lord Wright himself when he points out that the incorporation of terms of a given system of law in a commercial contract must not lead to the grave danger that bankers and other business men dealing with the bill of lading are faced with the necessity of investigating that foreign law as a whole.

III

In connexion with this question Lord Wright gave an explanation of the decision in *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*, [1920]

2 K.B. 287. In Dicey's view this decision embodies a principle that the legality of the performance of a contract is governed by the *lex loci solutionis* whatever be the proper law of the contract. In an article published in the *British Yearbook of International Law*, 1937, page 97, Dr. Mann points out that this rule belongs to English municipal law and that it is only an extension of the well-known principle that subsequent illegality excuses performance according to the English law of contracts. Lord Wright treats the principle in the *Ralli* case as an example of incorporation of a foreign rule by the proper law. It seems, therefore, that Dr. Mann was right when he pointed out that the *Ralli* rule could only operate if the proper law of the contract was English. Lord Wright also observes that the incidents and mode of performance are regulated by the *lex loci solutionis* only in so far as that law is incorporated by the proper law, a line of reasoning which may be of great importance in connexion with currency cases.

IV

It was thus clear that English law governed the contract. But the question arose whether the law of Newfoundland nullified the contract on the ground that it did not expressly refer to the Hague Rules, and, if so, whether an illegality imposed by the *lex loci contractus* was capable of affecting the validity of a contract subject to a proper law other than the *lex loci contractus*. In the United States the school of legal thought represented by Professor Beale and the Re-statement asserts that the formation of the contract is subject to the *lex loci contractus*, while its performance is said to be governed by the *lex loci solutionis*. This rule has never been adopted in this country where the proper law theory excludes scholastic refinements of this kind. Dicey, however, suggests in a tentative way that, whatever be the proper law of the contract, an illegality imposed by the place of its making vitiates the agreement in the eyes of English law. This principle is attacked by Dr. Cheshire and it must now be regarded as exploded by the case under review. The decision was that even if Newfoundland law nullified this English contract it would have to be upheld in the Courts of Nova Scotia. The validity of a contract is governed by its proper law and not by the *lex loci contractus*. It may be, of course, that the Courts of the country in which the contract was made regard its illegality as a matter of *ordre public international*. For example, if the English contract had come before the Courts of Newfoundland, those Courts might have refused to enforce it, treating the illegality as a matter of international public policy. The Courts of a third country, however, are not concerned with the *order public* of the *lex loci contractus*, and the case is an important authority for the principle that the Courts of this country will not be concerned with the international public policy of any other.

In order to dispose of Dicey's suggested rule the Judicial Committee had to discuss two cases which are frequently quoted for its support. The well-known decision of the Court of Appeal in *Re Missouri S.S. Company* (1889), 42 Ch.D. 321, contains dicta by Lord Halsbury which seem to justify an encroachment of the *lex loci contractus* upon the scope of the proper law with regard to illegality. Lord Wright, however, was of the opinion that this well-known dictum referred to "matters of foreign law of such a character that it would be against the comity of nations for an English Court to give effect to the transaction." In other words, he treated

Lord Halsbury's dictum as an expression of the principle of municipal law that a contract is void if it is calculated to interfere with the friendly relations between His Majesty's Government and a foreign State. Of this purely municipal English doctrine *Foster* v. *Driscoll*, [1929] 1 K.B. 470, is perhaps the most outstanding example. Again, views expressed by Dr. Mann in his article seem to have foreshadowed the development of the law.

The other case which had to be disposed of was *The Torni*, [1932] P. 78. In that case the Court of Appeal applied the law of Palestine to a bill of lading made in Palestine and by its own terms to be "construed" according to English law. This case was regarded by some as an authority for the correctness of Dicey's statement. But it had also been suggested that the bill of lading in *The Torni* was not subjected to English law at all, the English rules of *construction* only being incorporated in the contract. This highly artificial distinction between "to be governed" and "to be construed" by English law was not acceptable to Lord Wright. He was of the opinion that English law was the proper law of the contract in *The Torni* and that the decision of the Court of Appeal was wrong. The Privy Council expressly refused to follow it. English law should have been applied by the Court of Appeal; Palestinian law, the *lex loci contractus*, had nothing to do with the case.

Thus, the proper law theory of English law has at last come into its own. Once the parties have selected, expressly or impliedly, the law applicable to their case, it does not matter where the contract was made and where it is to be performed. The "autonomy" principle of English law is now co-extensive with that of the French and other Continental systems. In so far as the international theory of contracts is concerned the gulf between American and English law is now wider than that between English and Continental law.

This extends even to the formation of the contract itself. It has never been decided in this country which law determines the effect of an offer and of an acceptance of a contract. Lord Wright is of the opinion that this is also a matter to be decided by the proper law and not by the law of the country where the contract happened to be made. "There may also be questions in some cases as to the effect of non-performance of conditions, which, by the foreign law of the place where a contract was entered into, are essential to its formation, though even in that case the validity of the contract may depend on its proper law."

V

The plaintiffs contended that in view of the alleged invalidity of the bills of lading the defendants had become "bare bailees" and common carriers and could be made liable in tort. The question did not arise before the Privy Council, because their Lordships held the bills of lading to be valid. It was, however, pointed out that, even if they had been void, the plaintiffs could not have succeeded, because they were *in pari delicto* and could not, therefore, rely on the invalidity of the bills. Moreover, no liability in tort was possible beyond the contractual liability as determined by the bills. These were only *obiter dicta*. Had the Judicial Committee used this line of reasoning as the basis of their decision, as had been done by the Supreme Court of Nova Scotia, they would have had to examine the question which law governed the defendants' alleged liability in tort. This question could hardly be affected by English law.

It was purely a matter for Nova Scotia law being the *lex fori* as well as the *lex loci delicti commissi*.

VI

Apart from its importance for the conflict of laws, the decision must also be regarded as an authority in Mercantile Law. The Newfoundland Carriage of Goods by Sea Act is identical with the English Act of 1924, and the interpretation given to the former can be applied to the latter. The Judicial Committee found that s. 3, the so-called paramount section, need not be complied with in order to make the Act applicable. The Hague Rules apply although they are not expressly mentioned. Even if they are not mentioned the validity of the bill of lading is not affected. This is a statutory provision the infringement of which does not nullify the contract. It was clearly demonstrated by Lord Wright that this is the only construction which is in accordance with commercial convenience and that it would be against the interests of all those concerned with bills of lading if a mere omission to mention the Hague Rules invalidated the instrument.

The formidable difficulties which have to be overcome by international "legislation" are clearly demonstrated by this case. The scope given to the choice of law by the parties would seem to make it possible that by selecting a foreign system the operation of the Hague Rules can be excluded. It was suggested by Lord Wright that reference to English law as the proper law includes a reference to English conflict rules which incidentally would seem to import the recognition of *renvoi* in the field of contracts. One may wonder whether this is a desirable theory. If the parties submit to English law they want their agreement to be governed by the rules of English municipal law and not to be referred to a third system. Moreover, if a reference to English law was interpreted as a reference to municipal law only, the possibility of evading the Hague Rules could be restricted. S. 1 of the English Act of 1924 can be regarded as a rule of Private International Law limiting the application of the Hague Rules to shipments from English ports. If a reference to English law was interpreted as a reference to municipal law only, s. 1 would not be included in the reference and the Hague Rules would be applicable as part of English law, being the proper law of the contract.

O. KAHN-FREUND.

Stare decisis: Indecision in the Court of Appeal

Nearly all writers on the English legal system state categorically that the Court of Appeal is bound to follow its own previous decisions. The matter is, however, rather more doubtful than this large measure of agreement would suggest.

Salmond (*Jurisprudence*, Ninth Ed., p. 234) sets the pace by declaring that the Court of Appeal is absolutely bound by its own decisions and by those of older courts of co-ordinate authority, as, for example, the Court of Exchequer Chamber. In this he is followed by Geldart (*Elements of English Law*, p. 16—which in its later editions has the additional authority of Sir William Holdsworth), Mr. Fifoot (*English Law and its Background*, p. 24), Dr. C. K. Allen (*Law in the Making*, p. 154), Dr. Keeton (*Elementary Principles of Jurisprudence*, p. 70), and Dr. Goldschmidt (*English Law from the Foreign Standpoint*, p. 34). The same view is inherent in the

definition of the doctrine of precedent by Professor Jenks (*The Book of English Law*, p. 34). Professor Goodhart is more cautious, however, in his article "Precedent in English and Continental Law," 50 L.Q.R., p. 40, *et seq.* Although he states that the Court is probably bound by its own decisions, he admits a doubt raised in his mind by *dicta* in *Newsholme Bros.* v. *Road Transport and General Insurance Co.* (*infra*). A similar caution is apparent in Messrs. Radcliffe and Cross's *English Legal System* (p. 354). Pollock (*A First Book of Jurisprudence*, p. 332) follows the main trend of opinion though he thinks that a different rule may have prevailed in the late nineteenth century. Of greater interest is an extra-judicial opinion of Sir Henry Slesser, himself a Lord Justice of Appeal. He says (*The Law*, p. 63) that the Court of Appeal will ordinarily feel itself bound to follow its own judgments on the ground of the principle of judicial comity that, normally, courts of co-ordinate jurisdiction follow one another. It would seem, therefore, that he puts the rule no higher than that which prevails as between courts of instance jurisdiction, implying thereby that the Court of Appeal might refuse to follow its own previous decisions, in which case the two decisions would stand together as competing rules, until the House of Lords had chosen between them. That, however, is not a necessary corollary from Sir Henry Slesser's statement; for it may be that, should the Court be moved to infringe the principle of judicial comity, the later decision would overrule and abrogate the earlier.

Judicial statements are by no means unanimous but there are positive pronouncements which make it difficult to accept the more dogmatic statements of the textbooks.

In *Mills* v. *Jennings*, 13 Ch.D. 639, 648, Cotton, L.J., delivering the opinion of the Court (James, Bagallay, and Cotton, L.JJ.) said: "As a rule this Court ought to treat the decision of the Court of Appeal in Chancery as binding authorities; but we are at liberty not to do so when there is a sufficient reason for overruling them." The Court of Appeal in that case refused to follow a decision of the Court of Appeal in Chancery and affirmed its liberty "to reconsider and review the decision in that case as if it were being reheard in the old Court of Appeal in Chancery as was not uncommon." In *Kelly* v. *Kellond*, 20 Q.B.D. 569, Lord Esher, M.R., introduced some confusion by drawing a distinction between a full Court of six members and the ordinary quorum of three. In his view if the accuracy of a decision of the lesser number is called in question in a full Court that Court is entitled to decide whether or not to follow it. The learned Master of the Rolls, therefore, upheld the contention that the decision of a "quorum court" in *Roberts* v. *Roberts*, 13 Q.B.D. 295, had been overruled by a full court in *Ex parte Stanford*, 17 Q.B.D. 259, 269. Lopes, L.J., was also satisfied that though *Roberts* v. *Roberts* was directly in point it had been overruled by the later decision (at p. 575).

In *Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. 475, the Court sat with six Lords Justices and was faced with an earlier decision in *Daglish* v. *Barton*, [1900] 1 Q.B. 284, which was inconsistent with the view the Court took of the case before it. Their Lordships, being unable to agree with that case and thinking that it ought not to be followed, declared: "It is, therefore, overruled."

In *Newsholme Bros.* v. *Road Transport and General Insurance Co.*, [1929] 2 K.B. 356, Greer, L.J., said, without specifying the occasions, that the Court of Appeal had at least on two occasions sitting as a full Court differed from previous decisions of the Court, "and it seems to me,"

he added, "that, if that is right, it is equally right to say that, sitting with a quorum of three judges, it has exactly the same power as if it were sitting with six judges, though it would only be in most exceptional cases that those powers would be exercised" (at pp. 384–5).

Finally, in *Shoesmith* v. *Lancashire Mental Hospitals Board*, [1938] 4 All E.R. 186, Greer, L.J., reiterated his view in identical terms (at pp. 189–90) and summed the matter up thus: "Although as a matter of courtesy and of usual practice this Court deems it right to follow its own decisions in earlier cases there is no rule of law which compels it to do so." In this opinion Slesser, L.J., concurred, though he expressed agreement with the dictum of Lord Ellenborough, L.C.J., in *Moorson* v. *Kymer*, 2 M. & S., 303, 313, that "it is extremely dangerous to shake the authority of decided cases."

There are, however, impressive dicta on the other side. Thus in *Pledge* v. *Carr*, [1895] 1 Ch. 51, Lord Herschell, L.C., said: "We cannot overrule *Vint* v. *Paget*, for that was a decision of a court co-ordinate in jurisdiction with ourselves; all we can do, therefore, is to dismiss this appeal." Lindley and A. L. Smith, L.JJ., concurred. Again, in *Lavy* v. *London County Council*, [1895] 2 Q.B. 577, 581, Lindley, L.J., said: "The case of *L.C.C.* v. *Cross* is a decision which I think is not only correct, but it is a decision of the Court of Appeal which we should be bound to follow whether we thought it right or not." So great an authority as Scrutton, L.J., in the *Newsholme Case* (*supra*) gave it as his view that where the Court of Appeal decides that from certain facts certain legal consequences flow the decision is binding on the Court of Appeal in any case raising substantially similar facts (at p. 375). More recently, in *Sigley* v. *Hale* [1938] 3 All E.R. 87, 89, Greer, L.J., found it difficult to appreciate the reasons for a decision of the Court of Appeal which had been cited in argument but, nevertheless, admitted that "if a similar case ever comes before this Court on similar facts we will feel ourselves bound, owing to the traditional way in which these matters are treated, to follow that decision." In *Windsor* v. *Chalcraft*, [1938] 2 All E.R. 751, Slesser, L.J., admitted that a previous decision of the Court "of course, is binding upon us" (p. 756). And again, in *Cohen* v. *Cohen*, [1939] 2 All E.R. 596, McKinnon, L.J., in a judgment in which Luxmoore, L.J., and Macnaghten, J., concurred, referred to a previous decision of the Court and said that if that decision were wrong the Court of Appeal was powerless to overrule it and that only the House of Lords could do so.

It would be presumptuous, in the face of the diverse opinions of distinguished lawyers, to express any dogmatic conclusion. It is submitted, however, that Lord Esher's red herring can be advantageously ignored. There is no ground in law for imputing superior powers to a full Court. No doubt the decision of a full Court would in practice weigh very heavily, but the composition of the Court cannot affect the formal validity or legal weight of the decision. In practice, too, difficulties might arise. Thus, would a decision of six Lords-Justices be liable to be overruled by a decision of a full bench of the recently augmented Court of Appeal? The whole matter is one on which an authoritative pronouncement is necessary. This is, perhaps, an opportunity for the common law to admit a greater degree of flexibility into the working of judicial precedent. The rival interest of certainty would not necessarily suffer since the Court of Appeal would be unlikely to exercise its overruling powers except "in plain cases where serious inconvenience or injustice would follow from

perpetuating an erroneous construction or ruling of law," in the words used by Lord Wright as a guide to the House of Lords (*Admiralty Commissioners* v. *S.S Valverda*, [1938] A.C. 173).

E. WYNDHAM WHITE.

Common Employment in the House of Lords.

The decision of the Court of Appeal in *Radcliffe* v. *Ribble*, [1938] 2 K.B. 345, (annotated in Vol. II, No. 1, p. 43) has been reversed by the House of Lords, mainly by taking a different view of the facts. In the Court of Appeal stress was laid on circumstances which might serve to distinguish the case from the decision in *The Petrel*, [1893] P. 320, such as the similarity of the orders given to the coachdrivers and the fact that they were working in close juxtaposition. Greer, L.J., spoke of the existence of a team, but Lord Macmillan took the view that the drivers' work "involves their dispersal, not their collaboration." The House of Lords also disagreed with the Court of Appeal's finding that the negligent driver in attempting to assist the deceased had acted in a manner expected of him by his employer. The case was thus brought clearly within the *ratio* of *The Petrel*, and this decision was approved without hesitation, whereas the Court of Appeal had refused to express an opinion on it.

Beyond this confirmation of *The Petrel* the decision also indicates that wide scope is to be given to the limitation on the doctrine of common employment which is expressed in *The Petrel*. This seems to be the conclusion to be drawn from expressions of condemnation of common employment coupled with the statement that it is subject to important qualifications. This is another instance of the interpretation of a rule of law in a spirit directly opposite to that which inspired its initiation. Adjustment of the law to major changes of social policy is a matter for the legislature. If left to the courts it cannot be performed completely, and it is likely to produce some tortious reasoning which must detract from the authority and scientific character of the legal system.

The House of Lords, in addition to explaining its strict interpretation of "common work" on grounds of social policy, attempted to justify it according to more traditional methods of legal reasoning. It sought to trace the limits of common employment by examining the logical basis of the doctrine. It is of interest that when examining the various theories as to the true basis of the doctrine, Lord Atkin rejected that theory which is suggested by the most recent defender of the doctrine. Mr. Stephen Chapman argues that in the case of a servant "the whole foundation of the rule of vicarious liability has disappeared, because there is no question of any third party." (Vol. II, No. 4, at p. 294.) This argument, "namely that the doctrine of *respondeat superior* only applies to strangers, that it has no application to the servants of the employer," is described by Lord Atkin as "a fallacious proposition from first to last." (55 T.L.R., at p. 462.) The House of Lords accepts the theory of an implied contract as the basis of common employment, although this theory has been riddled by objections summed up most convincingly by Mr. Chapman. The difficulty of answering the question whose negligence the plaintiff would have excepted from his fictitious consent to risk negligence of his fellow-employees is, however, appreciated by the Court. Thus Lord Wright admits, "it is difficult sometimes to fit a factual qualification on a fictitious contract." Similarly Lord Atkin: "I strongly suspect that one cause of the difficulty

(of defining "common work") has been the unsatisfactory statement of any principle on which the rule is founded." He also states "that the Courts have in many cases tried to determine the limits of the principle as an objective rule of law without having regard to its foundation in the implied contract of the workman." This failure to consider the implied contract-theory might be explained by the fact that it would have been of little assistance in determining the limits of the doctrine, and the description of the treatment of common employment as of "an objective rule of law" appears to be a euphemism for: a doctrine lacking a sound logical or social foundation and therefore incapable of rational interpretation. Although the House of Lords could not remedy these defects its judgment is of value as prescribing the proper judicial bias in the approach to problems of common employment.

Following this decision, *Metcalfe* v. *L.P.T.B.* has also been reversed in the Court of Appeal, [1939] 2 All. E.R. 542. But this result was reached simply by attaching the fate of this case to *Radcliffe's Case*, although, it is submitted, the fallacy of the judgment of the Court of first instance lay in preferring the analogy of the facts of *Radcliffe's Case*, as found in the Court of Appeal, to the facts of *The Petrel*. The judgment of Macnaghten, J., may have been influenced by the loss of authority which *The Petrel* suffered as a result of the Court of Appeal's decision in *Radcliffe* v. *Ribble*. But this consideration cannot prevail after the approval of *The Petrel* in the House of Lords. An interesting result of the confirmation of the implied contract-theory by the House of Lords is counsel's argument as to the impossibility of implying into Metcalfe's contract of employment a term providing for acceptance of the risk of injury actually suffered. In cases where actually no contract of employment had been concluded this type of argument had prevailed over the plea of common employment. Lord Wright mentions these cases with approval and points out that later cases where common employment was held to apply to volunteers can only be sustained if they can be reconciled with the implied contract-theory. A revival of this reasoning would introduce into the law of master and servant artificialities similar to those which have encumbered the law of unjust enrichment.

J. UNGER.

Statute of Frauds and Quantum Meruit

Quantum meruit has frequently been in the legal news during recent years, and the basis on which it rests has been changed. Originally the doctrine of implied term was its mainspring, but this led to inequitable results, and the doctrine is now in the process of being discarded, at least as far as *quantum meruit* is concerned. As Greer, L.J., remarked in *Craven Ellis* v. *Canons, Ltd.*, [1936] 2 K.B. 403, in opposition to Goddard, J.'s decision at the trial, "the inference is not one of fact, but is an inference which a rule of law imposes on the parties where work has been done or goods have been delivered under what purports to be a binding contract, but is not so in fact." Indeed, the familiar argument that there could not be an implied term where there was an express consent bordered on the absurd, where the express consent related to a contract which the law did not consider binding.

The recent judgment in *Adams* v. *Union Cinemas, Ltd.*, [1939] 1 All E.R. 169 was used by Stable, J., as an opportunity to reaffirm the principle

laid down in the *Craven Ellis Case, supra,* though, it is submitted, the legal question involved hardly warranted this departure.

What happened was this. The plaintiff was employed by a cinema company, and when the latter was reconstructed in 1936 he became the defendants' servant, and continued to perform his old duties. The defendants were satisfied with his work and decided to promote him. This was done in a very casual way. On 25th June, 1937, the plaintiff was asked to step into the room of one of the directors, and was offered the position of controller of 120 cinemas at the same salary which was drawn by his predecessor. The director was not sure how much it was, but rather thought it ran into £2000 per annum; this figure later turned out to be correct. Some talk ensued about the post in general, and in the course of it the plaintiff asked for how long he was going to be appointed. He was told in reply that he should make arrangements for two years, but, the director added, "you will see how you get on with the work." With this the interview ended, and on 28th June the plaintiff entered on his new duties. He asked for a formal contract, which was promised but deferred, and he only received his old salary with a promise of adjustment later on. Subsequently the defendant company passed into other hands, and the defendant was given one month's notice. He sued for payment of the balance due to him while he had worked as well as for wages in lieu of a longer notice than one month.

The defendants denied liability. They relied first on s. 4, Statute of Frauds, and on *Britain* v. *Rossiter* (1882), 11 Q.B.D. 123, and secondly on the recent case of *Vernon* v. *Findlay* (1938), 55 T.L.R. 77.

However, judgment was given for the plaintiff. He was entitled to the arrears of his salary and to six months' notice. The learned judge came to the conclusion that the negotiations of 25th June did not amount to a contract. The two years mentioned as the duration of the service was (p. 172) "the perfectly natural forecast that Mr. Bernard (the director) was making as to how long, at all events, this relationship would continue, provided that everything went well." The defendants' offer was accepted by the plaintiff taking up his duties on 28th June, and the two years were then not agreed upon. What had happened was merely a modification of the plaintiff's former duties, and such an arrangement did not fall within s. 4, Statute of Frauds. The learned judge also considered *Vernon* v. *Findlay* to have been wrongly decided. There a verbal contract of service was made in December, the work to begin on 1st January, and to go on for one year. On these facts the contract was held not to be binding and the plaintiff not even entitled to a *quantum meruit,* but Stable, J., in *Adams's Case* thought that this decision was contrary to *Craven Ellis* v. *Canons, Ltd.* As to this, see *Modern Law Review,* Vol. 1, p. 76.

It is respectfully submitted that, though the result is right, two matters were dealt with in the judgment which were altogether incompatible, thus casting doubt on the entire reasoning.

In the first place, it seems curious that the reason for the contract being outside the statute should have been that what was done was only a modification of an old contract, when the learned judge himself said in an earlier passage (p. 171): "The question as to when the variation of the terms of a contract constitute a fresh contract and cases in which it is a mere modification of an existing contract are really cases which involve the splitting of hairs, and are mere questions of words."

It is suggested with deference that the real reason why the contract

fell outside the statute was based on the finding of fact that no fixed period had been agreed upon. "If the contract is for an indefinite time but can be determined by either party with reasonable notice within the year the statute does not apply." See Anson's *Law of Contract*, 18th edition, p. 68, and *McGregor* v. *McGregor* (1888), 21 Q.B.D. 424. However this proposition was not touched upon in the judgment.

Since therefore there was a valid contract for an indefinite time the question of a *quantum meruit* could not arise, and the words devoted to this problem become unnecessary, though they are of some importance because they point out that *Vernon* v. *Findlay* was in conflict with the decision of the Court of Appeal in the *Craven Ellis Case*.

Adams v. *Union Cinemas, Ltd.* is of interest only for two reasons. It supplies at last a commercial example of contracts for an indefinite period, and will illustrate to the student better than *McGregor* v. *McGregor* a proposition of law which is important while we suffer under the Statute of Frauds. Moreover, since there is a certain scarcity on this point, the practitioner will be glad to have a case which tells him what is a reasonable period of notice for a superior official in a business enterprise.

O. C. GILES.

Mortgages: Postponement of the Contractual Right to Redeem

It has been said[1] that in order to understand the equitable rules relating to mortgages "we must project ourselves into the thought of the seventeenth rather than into that of the twentieth century. The mortgagor must at all costs be protected—such was the fanatical creed of equity at the earlier period." Lord Northington, L.C., epitomised this traditional approach of equity in *Vernon* v. *Bethell*, 2 Eden 710: "Necessitous men are not, truly speaking, free men but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." This bias in favour of the mortgagor, springing from an antipathy to usurious extortion from the needy borrower, is, however, out of place when the Court is considering a transaction between parties who are competent business men, acting on skilled advice, and well able to judge of their own interests. Recent cases dealing with collateral stipulations in mortgages show a growing recognition of these realities. The transition from *Bradley* v. *Carritt*, [1903] A.C. 253, to *Kreglinger* v. *New Patagonia Meat Co.*, [1914] A.C. 25, marks a significant stage in the development of the law. The case of *Knightsbridge Trust Co.* v. *Byrne* (1939), 55 T.L.R. 196, is an equally significant decision. The plaintiffs, a private limited company, borrowed a sum of £310,000 from an insurance company and as security mortgaged to the lenders property consisting of a number of houses, shops and flats. It was agreed that the principal sum, together with interest at 5¼ per cent, should be repaid by eighty half-yearly payments spread over a period of forty years, this method of repayment being suggested by the mortgagors. The mortgagee's remedies became immediately exerciseable if the mortgagors should sell the equity of redemption without the consent of the mortgagee. There was no power under which the mortgagors could sell any one of the properties mortgaged free from the mortgage. The mortgagors were also restrained from granting leases for more than three years without the consent of the mortgagee. The mortgagors claimed that they were entitled to redeem on giving the usual six months' notice and paying

[1] H. G. Hanbury, *Modern Equity*, 2nd ed., p. 393.

the principal interest and costs. This they were clearly not entitled to do under the terms of the agreement, but they contended that the right to redeem cannot be postponed for an unreasonable period and that forty years was unreasonable. There is ample support for this proposition in the textbooks. Thus the statement in *Coote on Mortgages*, 9th ed., Vol. 1, page 15, is typical: "The mortgagor may stipulate that he will not pay off his debt and so redeem his mortgage for a fixed period, as, for instance, five or seven years. . . . But it is otherwise where the period is unreasonable. . . . A proviso restraining redemption for so long a period as twenty-eight years is always unreasonable and void, at least where there is no corresponding restriction preventing the mortgagee from calling in his money." This and similar statements are founded on a line of cases starting with *Teevan* v. *Smith*, 20 Ch.D. 724, and culminating in *Davis* v. *Symons*, [1934] Ch. 442. In the former case Jessel, M.R., said that a mortgagor may be precluded from redeeming for a fixed period such as five or seven years. Later cases (e.g. *Morgan* v. *Jefferies*, [1910] 1 Ch. 627) suggest that the proviso must be mutual, i.e. the mortgagee must be restrained from calling in the loan for a like period, and in any case the Court may prevent the application of the clause "if it is too large, or there are circumstances connected with the proviso which render it in the opinion of the Court unreasonable or oppressive" (*per* Romer, J., in *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307, 311; *cf. Bradley* v. *Carritt*, [1903] A.C. 253, 259, *per* Lord Macnaghten). In *Morgan* v. *Jeffreys*, [1910] 1 Ch. 620, Joyce, J., gave relief against a proviso postponing redemption for a period of 28 years as being unreasonable, having regard to the position of the mortgagor, the character of the stipulations in the agreement and the severity of the provisions for the benefit of the mortgagee. In *Davis* v. *Symons*, [1934] Ch. 442, there were mutual covenants between mortgagor and mortgagee that the principal sum should be allowed to remain on the security of the mortgage for twenty years. While not prepared to say that the period of twenty years was necessarily unreasonable, Eve, J., gave relief against the proviso because there were other stipulations in the mortgage deed hampering the mortgagor which rendered this provision unreasonable.

The case came in the first instance before Luxmoore, J. ([1938] Ch. 741). The learned judge, basing himself on these decisions, proceeded to consider the proviso in the light of the other provisions in the deed. In the result he decided that the provision for postponement was unreasonable having regard particularly to the fact that the mortgagors had no power to sell any part of the mortgaged properties free from the mortgage even though the value of the property might be many times in excess of the amount outstanding, and that the mortgagee's powers became exerciseable on any default by the mortgagor in the covenants to repair or insure any part of the mortgaged properties again even though there was a wide disproportion between the property charged and the amount for the time being outstanding.

On appeal the Court of Appeal emphatically rejected the suggestion that the Court has power to relieve against a proviso for postponement of the contractual right to redeem on the ground that it is unreasonable. Such a proviso is not a clog on the equity of redemption since it is concerned with the contractual right to redeem. It is indisputable that any provision which hampers redemption after the contractual date has passed will not be permitted. In so far as the earlier cases suggest that the Court

can give relief on the ground that the proviso is unreasonable they cannot be supported. Equity does not reform mortgage transactions because they are unreasonable. It is concerned to see two things: (1) that the essential requirements of a mortgage transaction are observed (2) that oppressive or unconscionable terms are not enforced. A postponement of the right of redemption may be the badge of oppression, or it may be unreasonable in the sense that it renders the right of redemption illusory. So that where in a mortgage of a lease of twenty years the contractual right to redeem is postponed until six weeks before the expiration of the lease equity will grant relief since the right of redemption, which is an essential element of a mortgage, is thereby rendered illusory (*Fairclough* v. *Swan Brewery Co. Ltd.*, [1912] A.C. 565). There was nothing in the present transaction to render the right of redemption illusory and the postponement being in itself unobjectionable it could not be made objectionable by the presence in the mortgage deed of other provisions unless the totality were sufficient to enable the Court to say that the contract was so unconscionable or oppressive that it ought not to be enforced in a court of equity.

Quite apart from the technicalities of the law of mortgages the judgment of Greene, M.R., is a striking assertion of the claims of freedom of contract. The learned Master of the Rolls vigorously repudiated the suggestion that when considering the "reasonableness" of the transaction the Court is confined to the terms of the disputed document and may not take account of extraneous circumstances. The Court cannot tell business men that an agreement is unreasonable unless it considers the "business realities." "To hold that the law is to tell business men what is reasonable in such circumstances and to refuse to take into account the business considerations involved would bring the law into disrepute" (at p. 198). In the result, even had the Court been inclined to adopt the standard of "reasonableness," it would have come to a different conclusion from Luxmoore, J. Here the Court was faced with "a commercial agreement between two corporations experienced in such matters and [which] has none of the features of an oppressive bargain where the borrower is at the mercy of an oppressive moneylender" (at p. 198). When all the circumstances were considered it was a proper business transaction with which the Court would not interfere.

It had also been contended before Luxmoore, J., that the postponement of the contractual right to redeem for a period of forty years offended the rule against perpetuities and was therefore invalid. Luxmoore, J., referred to *Gray on Perpetuities*, 3rd ed., pp. 460–3, where a similar suggestion is made, but was satisfied that the perpetuity rule could have no application to a mortgage by demise since it has been universally accepted that the perpetuity rule has no application to a condition in defeasance of a term of years (*cf.*, 3rd Report, Real Property Commissioners, 1832, p. 43; Challis, *Real Property*, 3rd ed., p. 186). Quite apart from that argument the learned judge was satisfied that the rule against perpetuities has no application to mortgages and to apply it to mortgages would be inconsistent with the history and principles of redemption of a mortgage. On this point the Court of Appeal upheld Luxmoore, J. Mortgages are not within the particular mischief that the perpetuity rule was designed to prevent, namely the tying up of land for unduly long periods by testators and settlors. The Rule has never been applied to mortgages and it would be wrong now so to apply it.

It was also argued before the trial judge that the mortgage deed was a debenture within the meaning of the Companies Act, 1929, s. 380; consequently s. 74 of the Act applied to it and the provisions of that section had the effect of excluding the rules of equity relating to postponement of redemption. The learned judge held that s. 74 has no application to an ordinary mortgage. On this point the Court of Appeal expressed no opinion.

E. WYNDHAM WHITE.

REVIEWS

CARDOZO AND FRONTIERS OF LEGAL THINKING. By BERYL HAROLD LEVY. New York: Oxford University Press. **$2.50.** London: Humphrey Milford, 1938. xv + 315 pp. **10s. 6d.**

Since the passing of Mr. Justice Holmes, the brightest judicial luminary of the American legal scene has been his successor on the Supreme Court of the United States, Benjamin N. Cardozo, previously Chief Judge of the powerful Court of Appeals of the State of New York. Cardozo's death last year at the comparatively early age of sixty-eight, after only six years of service on the Supreme Court, is an inestimable loss not only to the American bench but to legal scholarship. For Cardozo was no ordinary appellate judge. Not only was he a common law judge in the tradition of Mansfield and an equity judge in the tradition of Hardwicke; not only was he a worthy successor to Holmes in the delicate task of constitutional adjudication which forms the main preoccupation of the highest court of the United States; he also has told us more than any other of the actual method and technique of judicial decision and has written with rare grace and profound insight of the permanent problems of law and jurisprudence. Between 1922 and 1928, while a member of the highest court of New York, there appeared from his pen three small volumes—*The Nature of the Judicial Process*, *The Growth of the Law*, and *The Paradoxes of Legal Science*—which rank with the classics of juristic thinking. More than any judge of the last generation, he influenced and remade American private law; in his brief service on the Supreme Court, he helped mightily to give a new direction to constitutional decision; he contributed significantly to understanding of the judicial process under the Anglo-American tradition; by the gentle force of his character he made himself loved and respected as few judges have ever been.

Much has been written about Mr. Justice Cardozo before and since his death. While Dr. Levy's volume falls in the former category, it appeared after the public career of its subject had ended, and so is not forced into the dubious incompleteness of most studies of living great men. In the book, Dr. Levy has attempted two things: First, to present a picture of Cardozo and his mode of thought and decision in relation to present currents of American juristic thinking; and second, to place before the reader a selected group of representative opinions by Cardozo himself. These attempts require separate appraisal.

Dr. Levy's own treatment makes up a little more than a third of the whole book. In length and form it is an essay. In substance, it is an anthology of quotations, mostly from Cardozo, connected by brief comments by Dr. Levy himself, with an occasional excursus into contemporary American jurisprudence or philosophy. I must admit to some puzzlement as to the character of the beneficiaries of these discussions. Is the book for lawyers, for students of jurisprudence, for educated laymen, or for whom? To take but one example, Dr. Levy discusses at some length (pp. 39–46), under the provocative heading "A Dying Myth," the old question whether judges make or only declare the law. If this discussion is for lawyers, it is for those who still live in the last century. If it is for students of jurisprudence, it assumes in them an amazing naiveté and ignorance of the literature of their subject. If it is another attempt of the many current attempts at adult education of the "intelligent layman,"

it is likely to convey a false sense of the character of the problem and how it has been dealt with in legal thought. The fact is, I suspect, that Dr. Levy has not thought his problems through, nor has he definitely decided what kind of a book he wanted to write. He has read widely. He shows some flashes of insight, as where he points out that the "method of sociology" described in Cardozo's *Nature of the Judicial Process* is rather a method of ethics (p. 61). Beside Cardozo and Holmes, he knows of the current American writers on jurisprudence and philosophy; but his method is anthological and his purpose uncertain. The main value of the first part of the book lies in those parts which Mr. Justice Cardozo has written.

The latter two-thirds of the book is all Cardozo. Dr. Levy has reprinted twenty-two selected opinions in cases decided from 1914 to 1937. All but one of these were written by Cardozo while on the Court of Appeals of New York. The one Supreme Court opinion is that upholding as constitutional the old-age benefit provisions of the Social Security Act of 1935. Of course no selection of the opinions of any judge is likely to prove wholly satisfactory to anyone other than the person making the selection, and it does not do to be too captious. But it does seem that some better criterion of choice could have been found than that of including one opinion by Cardozo "in each major field of law listed by the New York Board of Bar Examiners" (p. 122), especially when some of the selected cases do not in fact fall within the fields which they are said to represent. If the selection is to be by subject, *Palsgraf* v. *Long Island R. R. Co.*, 248 N.Y. 339 (1928) (p. 124), may well represent Torts, but not to the exclusion of *McPherson* v. *Buick Motor Co.*, 217 N.Y. 382 (1916), a decision that has had its influence across the Atlantic. See *Donoghue* v. *Stevenson*, [1932] A.C. 562. The choice of *Globe Woollen Co.* v. *Utica Gas & Electric Co.*, 224 N.Y. 483 (1918) (p. 180), as representative of Cardozo's decisions in Equity is little short of absurd. There would have been illumination in the inclusion of *Epstein* v. *Gluckin*, 233 N.Y. 490 (1922), which gave a *quietus* to Lord Justice Fry's artificial doctrine of mutuality of remedy in specific performance, or of the vigorous dissenting opinion in *Graf* v. *Hope Building Corporation*, 254 N.Y. 1 (1930), where Cardozo's words bring to mind the classical days of English equity. And how could Dr. Levy include *People* ex rel. *Lehigh Valley Ry. Co.* v. *State Tax Commission*, 247 N.Y. 9 (1928) (p. 235), as a decision on Public Utilities? It involved a public utility as relator, but it is a tax case only. However, though we may quarrel with the selection of opinions, there can be no quarrel with the opinions themselves. They can be read not only as law but as literature, and it is good to have some of them thus assembled.

In January, 1939, there was published jointly by the Law Reviews of Columbia, Harvard and Yale, a memorial number to Mr. Justice Cardozo. If any reader seeks a view of Cardozo's life and work presented with understanding and significance, let him read the articles which that issue contains. Let him read especially the brief tributes by Cardozo's associate on the Supreme Court, Mr. Justice Stone, by Mr. Justice Evatt of the High Court of Australia, and, most moving of all, by that great American federal judge Learned Hand. Let him learn of Cardozo's influence on the New York Court of Appeals from his associate there, Judge Lehman, and of his influence on the American law of contract and tort from two masters in those fields, Professor Corbin of Yale and Professor Seavey of Harvard; finally, let him study Cardozo's contributions to American

public law as appraised by Cardozo's successor on the Supreme Court, Mr. Justice Frankfurter. And if he wishes to see Cardozo as scholar and jurist in the perspective of American juristic thought, let him read Professor Moses J. Aronson's careful and thought-provoking study, "Cardozo's Doctrine of Sociological Jurisprudence," in the October, 1938, issue of the *Journal of Social Philosophy*. Best of all, let him read Cardozo's own *Nature of the Judicial Process*.

If any reader think it unfair that I should measure the slight performance of Dr. Levy against such high standards as these, I say only that one who seeks to interpret genius must be prepared to be measured in terms of the majesty of his subject.

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THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY. Harvard Studies in the Conflict of Laws, Vol. III. By ALEXANDER NÉKÁM. Cambridge, Mass.: Harvard University Press, and London: Humphrey Milford, Oxford University Press, 1938. 131 pp. **8s. 6d.**

Dr. Nékám is so much of a "realist" in matters of jurisprudence that to many he will appear an anarchist. For him all legal ideas and theories are, *ultima analysi*, the products of emotions. The emotional valuations of any one man are of course conditioned by those of others with whom he comes into contact; hence in a community with a common life we find a common ethic. And, as man has a pathetic desire to appear rational to himself, he—unconsciously—clothes his emotional valuations with the semblance of reason, so that his ethic appears to him to have an objective and absolute validity. Hence the belief in Natural Law. But examination of the views held at various times as to the content of Natural Law shows that their exponents were merely objectifying their own emotional valuations, which commonly took the form of affection for the ethic and law with which they were themselves most familiar (for example, Roman law); one feels that what one is accustomed to do oneself is "natural."

And so with the concept of Personality. Although in early communities (and even to some extent in mature Roman law) the group and not the individual may have been felt as the natural unit, modern ethic and law tend to feel and so to think of the individual human being as the natural unit. From this there have followed two conclusions, neither of them logically necessary. First, that the "legal entity"—that which in law is conceived of as the subject of rights and duties—must be a human being or at least something which has some of the characteristics of a human being and can, like the human being, be called a "person." Second, that the human being must as such have certain legal rights and that the other "persons" known to the law must have the same rights or at least the minimum of these rights which is necessary to constitute "personality."

Dr. Nékám's examination of French writings on the question of Personality shows the difficulties and contradictions caused by this desire to treat the legal entity as a "person." The French law of associations and commercial societies presents us with different types of groups which have different capacities as right- and duty-bearing entities. Are they all "persons"? If so, it would appear impossible to stop at any point short of

saying that any entity with capacity to hold even a single legal right is a "person"—a conclusion which French jurists are unwilling to accept. If not, then what is the essential minimum of rights necessary to constitute "personality"? Controversy has raged around this topic for many years and there appears no prospect of an answer which will be unanimously accepted, because—in Dr. Nékám's view—the question cannot be solved by logic and the theories of the various writers are merely attempts to justify their subjective emotional evaluations. Yet it is a question of considerable practical importance for French law.

A brief study of the Anglo-American law of "corporations" shows the same multiplicity of types of legal entity. Not one of Blackstone's five essentials "necessarily and inseparably incident to every corporation" proves to be really so in practice. There are corporations not of unlimited duration, corporations which cannot hold lands, corporations which have no common seal, corporations which have no power to make by-laws. On the other hand "unincorporated" entities may have any or several of these characteristics. There are even "unincorporated" groups which can (at least through a representative officer) sue and be sued as such. Fortunately Anglo-American law has on the whole been content to work with this multiplicity of entities, recognising the specific character of each, and has been little troubled by attempts to fit them into a uniform mould labelled "personality."

The practice of Anglo-American law thus bears out Dr. Nékám's thesis, that the word "person" is meaningless unless it simply denotes any "subject of legal rights," however many or few and of whatever nature, and that in this sense it is unnecessary and might well be replaced by the less misleading term "legal entity."

The present reviewer happening to hold a view of legal personality not far removed from that of Dr. Nékám's finds it a little difficult to criticise his book. Much of it seems to him to be a labouring of obvious truths. But perhaps it will not seem so to others. And even those who are already in agreement with its main position will be grateful for a number of reflections which had not occurred to them and of instances which they had not thought of searching out for themselves. Dr. Nékám's book in no way professes to be an exhaustive treatise. He does not refer to well-known writings and doctrines which such a treatise would have had to discuss. But his presentation gains thereby in unity and clarity. What he has given us is a coherent and well-written argument, illustrated and confirmed by a sufficiency of aptly-chosen instances, and containing many stimulating and suggestive incidental reflections. He has, by the way, although his work is published in a series bearing the general title of "Studies in the Conflict of Laws," little or nothing to say directly about that topic. But the importance of his conclusions for the subject is obvious. As he remarks on his last page: "Because of a mistaken conception of personality, many a right—belonging to entities not regarded as persons—has been lost sight of in international intercourse, while on the other hand rights and obligations have been freely distributed to so-called 'foreign persons' on the strength of their name and their supposedly essential attributes." The danger of being misled by a clumsy and ambiguous terminology is particularly great in a branch of law where the practitioner is compelled to apply concepts of foreign law of which he has not, as he has of the concepts of his own system, the instinctive understanding bred of long familiarity.

A. H. CAMPBELL.

READINGS IN JURISPRUDENCE. Selected, Edited and Arranged by JEROME HALL. Indianapolis: The Bobbs-Merrill Company, 1938. **32s. 6d.**

DIE RECHTSPHILOSOPHISCHE SCHULE DER REINEN RECHTSLEHRE. By WILLIAM EBENSTEIN. Prag., 1938. Taussig & Taussig.

JUSTICE-DROIT-ETAT. Etudes de Philosophie Juridique. By GEORGES DEL VECCHIO. Recueil Sirey. Paris, 1938. **75 frs.**

INTRODUCTION A LA THEORIE GENERALE ET A LA PHILOSOPHIE DU DROIT. By CLAUDE DU PASQUIER. Recueil Sirey. Paris, 1937.

LE BUT DU DROIT: Bien Commun, Justice, Securité. Recueil Sirey. Paris, 1938.

The publication of Professor Hall's book (of almost 1200 pages) must be hailed as a major event in the study and teaching of Jurisprudence. In no other field is a selection of readings as difficult as in Jurisprudence, a subject composed of so different parts and infinite in scope. But it is all the more important to have, instead of scattered and largely inaccessible literature or of second-hand accounts, a selection of original texts, systematically arranged and detailed enough to give an adequate idea of the author and the problem in question.

Professor Hall's book has three main parts: Philosophy of Law, Analytical Jurisprudence, Law and Social Science. The first is, in many ways, the most interesting, because there is not yet any systematic treatise on legal philosophy in the English language, despite the increased interest in continental philosophy. The teaching of legal theory is at present a difficult task in this country, owing to the lack of a systematic background. Certain continental authors have been discovered and translated, and the unfortunate student is treated to some Stammler or Kelsen, without the general and philosophical background without which they are unintelligible. Professor Hall's arrangement and selection is admirable. I would venture only two criticisms. In the chapter on Natural Law there is no reference at all to the revival of Natural Law theories in modern times. Many of the modern theories, to be sure, use the name rather than the substance of Natural Law. But that is certainly not true of jurists like Cathrein, Hauriou, Renard, Bonnard, Le Fur, etc., who in many ways give a revival of scholastic thought. The next edition, it is hoped, will include some account of modern Natural Law theories. A more serious criticism is the complete omission of any account of totalitarian theories in Jurisprudence. The present reviewer has repeatedly drawn attention to the pathetic neglect, by legal science in the democratic countries, of the profound effect which totalitarian political theories have upon the meaning and function of law. Hardly anything is of more vital importance to the present-day student of Jurisprudence. Such a chapter might have started with Hegel—who, surprisingly enough, finds no place at all in the book—and traced Neo-Hegelianism down to Fascist and National-Socialist theories on one hand and legal Materialism (Marx, Communism) on the other.

The second part wisely refrains from formal analysis of special subjects, such as Tort, Property, etc., which, as the author rightly remarks, can only be adequately studied in connexion with that particular branch.

It deals instead, in an admirable selection, with problems of logical analysis of the law.

In the third part Professor Hall clearly shows his own opinion on the scope of Jurisprudence. It is entitled "Law and Social Science," and gives a very extended and valuable selection of readings on the many points of contact between legal and social science. In view of the vagueness of the term "Sociological Jurisprudence," Professor Hall's arrangement is particularly interesting. It is also interesting that the proportion of English authors in this part is infinitesimal. One difficulty is that the selection must be confined to texts in the English languages. Despite the increasing number of translations of continental texts, there are bound to be many gaps. Some of them could have been overcome by extracts from representative accounts in English books.

The pedagogic value of the book is enhanced by a number of footnotes in which questions are put in connexion with the subject under consideration. Thus at the end of the chapter on Historical Jurisprudence, Professor Hall very appropriately puts some questions on the doubtful meaning of this term.

No classification in Jurisprudence will, of course, command universal assent. But as a basis for the study of almost any field of Jurisprudence this book will, in future, be indispensable.

Dr. Ebenstein's book is a very able presentation of the philosophical and juristic basis of the Pure Theory of Law, and of the particular results which the Vienna School—Kelsen, Merkl, Weyr, Verdross and others—have reached. The author lays particular stress upon the concrete juristic conclusions and the solution of legal problems by the theories of the Vienna School, in particular by its Stufentheorie (the theory of the concretisation of the law). The author is perhaps too seldom critical. Thus it is rightly pointed out that the theory of concretisation from the general fundamental norm down to the concretisation by judgment and enforcement tallies with the Free Law theories which show that the judge often has a choice between different solutions in applying the legal norm by which he is bound. True, but the Pure Theory of Law gives no help or guidance as to the finding of the proper solution. Maybe it is not "pure" law. But then it is not enough to know pure law. The judge must know something else, and it is just as well that jurists should try and find out something about it, rather than to be guided by sentiment. The one serious omission in this very careful book is the absence of anything more than a reference to the implications of the Pure Theory of Law in the field of Public International Law. Yet in that field it has perhaps made its most important contribution, by showing the incompatibility of national sovereignty with a true International Law.

The French translation of the most important of Del Vecchio's later essays will make accessible to a larger public his more recent teaching which shows some remarkable developments from the Neo-Kantian basis so clearly apparent in the author's "Formal Bases of Law." Much of the later work is devoted to a juristic glorification of Italian Fascism, in all its aspects, and of the corporative system in particular, as the synthesis of individual liberty and state authority. The author emphatically affirms that the Fascist state maintains the autonomy and the fundamental rights of the individual and, indeed, gives them perfect expression. (This was before the measures of racial discrimination.) In a lecture given in 1931 on State and International Society the author goes far in stipulating

the supremacy of international over national society and the progressive integration of states into a universal society. When the lecture was published in 1936 in Bucharest, the author added a rider reserving his position towards the recently adopted attitude of the League.

The present reviewer does not wish to question the sincerity of Professor Del Vecchio's political convictions nor to give a judgment on the political or juristic merits of Fascism. But the present volume seems to him to be an alarming example of the way in which legal philosophy may be distorted to justify desired political conclusions. If it is possible to deduce Fascism from Kant, everything is possible. Again if Fascism protects the autonomy of the individual—an assertion contrary to the essential and avowed principles of Fascism—autonomy of the individual may mean anything. Every legal theory builds, of course, on certain basic assumptions of an ethical or political character. And there are certain fundamental assumptions between which there is no compromise.

Needless to say the collection shows again the eminent jurist's profound learning and lucidity of exposition.

Professor du Pasquier's book is a very useful, concise course on Jurisprudence, designed for continental students. Its chief value for the English and American student of Jurisprudence lies in the introduction given to all currents and representatives of continental legal theory, down to 1937, while the complete absence of any reference to Anglo-American legal thought shows that there is still much to be done in bringing together the two legal worlds which are more and more confronted with identical problems.

The third volume published by the Institut International de Philosophie du Droit et de Sociologie Juridique gives again a valuable contribution to some problems of legal theory, this time on the ends of law, discussed by prominent jurists of many countries at the Congress at Rome in 1937. The chief problem which emerges from the papers and discussions is whether Common Good, Justice and Security can all be pursued together or whether a choice has to be made between these ends. The advanced student of Jurisprudence will read the discussions with profit.

W. FRIEDMANN.

RECENT THEORIES OF SOVEREIGNTY. By HYMAN EZRA COHEN. The University of Chicago Press. (In England, The Cambridge University Press). ix + 169 pp. **13s. 6d.** net.

One of the most striking features of modern juristic and political thought is the general attack upon absolutism in relation to sovereignty. Inasmuch as this attack began before Einstein had published the fruits of his researches, it may be that lawyers can claim some little credit for originality. However that may be, little is now left of Austinian dogmatism, whether the approach be formalist (as with Kelsen) or sociological (as with Duguit and his successors). In this short monograph, Mr. Cohen sets out plainly and concisely the theories of some of the foremost of modern jurists and political theorists, in so far as they bear upon his problem. The choice is necessarily a little arbitrary—it includes Jellinek, Esmein, Duguit, Kelsen, the Vienna school, and Laski, but it omits Willoughby, Krabbe, Del Vecchio, and Stammler, and there are no doubt others who could well have been included. As always in juristic thought, the cardinal problem is that of selection, and it must be admitted that by limiting the

field of enquiry, the author has left a reasonably clear impression upon the reader's mind. Moreover, there is an excellent bibliography, for which students will be grateful. The conclusions are cautious. Mr. Cohen says (p. 139): "Apparently twentieth-century theory still has not gone beyond these ends of government; democracy, constitutionalism, and individualism persist throughout all formulations, like the purple thread in the Hebrew fringes. But the twentieth century has begun to show signs that even these may be the subject of the next attack." It undoubtedly has, both in Russian legal thought, and in the legal and political philosophy of the totalitarian states. As yet, no one can say what permanent mark these extremer manifestations will leave. Meanwhile, Mr. Cohen's book is a very useful stocktaking.

G. W. KEETON

CAUSES OF CRIME. Biological Theories in the United States, 1800–1915. By ARTHUR E. FINK, Department of Sociology, University of Pennsylvania. University of Pennsylvania Press. 1938. x + 309 pp. English price **14s.**

At the suggestion of Professor Thorsten Sellin, Philadelphia, the author has undertaken to give a comprehensive picture of American contribution to the biological study of crime from the very beginning of criminological research up to the first publications of William Healy, whom the author justly regards as the pioneer of an entirely new era. The scope of the book is thus somewhat narrower than its main title might indicate, but within these self-imposed limits it presents a very thorough and well-documented history of the treatment, in American criminology, of certain chiefly biological and psychiatric problems, as insanity and feeble-mindedness, "moral insanity," alcoholism, and the significance of the hereditarian factor in general. Entirely excluded from the author's review are therefore the social factors in the causation of crime, which have now come to occupy the place of honour in American research. The prevailing impression gained from the author's detailed narrative is that the biological aspects of crime have in the United States been subject to a discussion more extensive than original (the author's bibliography, exclusively devoted to publications by American writers, fills no less than fifty pages!). In a well-balanced concluding chapter the author aptly interprets the position by saying that "there was no one school, no one theory, of crime causation which was indigenous to America. This is not to say that there was a lack of theories, but rather that the abundance of theories was taken over from the European scene" (p. 244). And he finds the explanation in the fact that American culture in the nineteenth century had to deal with too many urgent practical problems to devote much original thought to what was then regarded as a mainly theoretical question. It was left to the twentieth century to realise that the practical tasks of penology cannot be efficiently solved without a deeper insight into the causation of crime.

To sum up: The author has done valuable spade work for the future historian of American criminology, and more than that, his book will be indispensable for everyone desirous to study the rôle of the biological school in general.

HERMANN MANNHEIM.

THE CRIMINALS WE DESERVE. By HENRY T. F. RHODES, of the Institute of Criminology, University of Lyons, and the International Academy of Criminology. Methuen, London. 1937. 257 pp. **7s. 6d.** net.

This is a book easy to read, but difficult to review owing to the extreme variety of the topics upon which it touches. Well written, never dull, and full of interesting detail, it is the work of a man who is apparently at home not only in the world of crime itself, but is equally conversant with the technique of crime detection and prevention. His main thesis —modern society mass-produces crime just as it mass-produces public opinion and motor cars—whilst not absolutely original, is certainly true, though in some respects the reader may be inclined to regard the author as somewhat over-pessimistic. The slums, which he justly brands as the chief breeding places of crime, are slowly disappearing, and education cannot simply be accused in this way as making matters worse, because "the capacity to appreciate and desire better conditions is instilled without there being adequate machinery to satisfy these desires." The problem how far education is of real value in preventing crime has troubled the expert from the beginnings of scientific criminology. A hundred years ago, Guerry and Fletcher already recognised that education *alone* cannot be expected to solve the problem; it is not as simple as Victor Hugo imagined: "for every school that is opened a prison can be closed." But *without* education there can certainly be no progress, and the difficulty narrows down to that of having the right type of education for the various types of people.

There are in the book a few more generalisations that should perhaps not be allowed to pass without some contradiction. Even the most fervent admirer of the great and incontrovertible contributions made by psychoanalysis to our knowledge of crime and its causes will be reluctant to subscribe to the statement that "probably 75 per cent of crimes of murder and violence are at least indirectly due" to the Oedipus complex (p. 3). This seems an exaggeration that can do only harm to a great scientific movement.

The author is at his best when he is dealing with such topics as the opium traffic, the "white slave traffic," the technique of forgery (to which he has devoted a separate book), etc.

HERMANN MANNHEIM.

L'ÉVOLUTION DE LA JURISPRUDENCE FRANÇAISE EN MATIÈRE DE CONFLIT DES LOIS DEPUIS LE DÉBUT DU XXe SIÈCLE. By JACQUES DONNEDIEU DE VABRES. Sirey, 1938. 781 pp. **100 frs.**

In 1905, M. H. Donnedieu de Vabres, now Professor at the Sorbonne, published his thesis on *Évolution de la Jurisprudence Française en matière de conflit des lois*. He described the work done by the French courts during the nineteenth century to develop a modern system of private international law. M. Jacques Donnedieu de Vabres has now continued the thread where it was left more than thirty years ago. He has produced a highly interesting and important book, which no doubt does honour to the family tradition. Nevertheless, the non-French reviewer who has worked himself through the 767 pages, is left with curiously mixed feelings of admiration and dissatisfaction.

The book deals with every question of Private International Law which has ever come before the French courts or which is discussed in French theory. It describes in every connexion the development and trend of French court practice. The comparative lawyer is particularly grateful for the strong emphasis placed on, and the careful analysis of, decisions—a method which French textbooks more interested in the "*système*" so often neglect. The material thus presented to the reader is so enormous that the book is a textbook, based on court practice, rather than a monograph in the usual sense, and whoever desires to know how a particular question is treated in French practice can certainly employ it as a useful guide. To mention just one topic out of a vast number, attention might be drawn to the development of the principle of *locus regit actum*. In France the existence of the rule, though not laid down in the Code, is undoubted. But has it an imperative character or an optional one in the sense recently propounded by Cheshire (*Private International Law*, 2nd edition, pp. 244 *et seq.*)? The point arose especially in connexion with wills of foreigners, which were made in France, but which under the French rules of Private International Law were subject to the law of the testator's nationality. In the course of the nineteenth century many decisions of the Cour de Cassation as well as of Lower Courts had adopted the view that the rule *locus regit actum* had to be strictly observed. But a decisive reaction, well prepared by theoretical research, set in when on 20th July, 1909, the Cour de Cassation had to decide the case of *Viditz* v. *Gesling*. An English lady died in Paris leaving a will made in France in English form, but invalid according to French Law. The will was upheld, one of the *attendu* being that the rule *locus regit actum* "a été admise pour faciliter les actes accomplis soit pour les Français à l'étranger soit pour les étrangers en France, et elle n'a d'autre effet que d'accorder au testateur un droit d'option entre les formes admises par sa loi nationale et celles qui sont exigées par la loi du lieu où il se trouve." Soon afterwards the point arose concerning an American subject domiciled in France who had made a will in France in American form, which was invalid according to American Law, since this required the form prescribed by the law of the testator's domicile. In view of the *renvoi* the will was held invalid: *Sanchez* v. *Wallerstein*, Trib. Civ. Seine, 10th July, 1910, *Clunet*, 1911, 912. In a still later case *mutatis mutandis* identical facts made it necessary to consider the effect of the Wills Act, 1861, which is known not to allow the use of the English form as such. The will of the Englishman who was domiciled in France but had made an English will in France was—notwithstanding its invalidity under English Law—held to be valid on the ground that English Law "doit être entendue dans un sens large, conforme à l'esprit libéral du législateur anglais qui a manifestement voulu donner toutes facilités aux sujets anglais pour faire en tous lieux des dispositions testamentaires valables": *Cuez* v. *Ben Attar*, Cour d'Alger, 26th May, 1919, *Clunet*, 1920, 241.

All this makes interesting and stimulating reading. Whether the discussion of the general tendencies influencing French courts is equally fortunate, is a different matter. Although the period examined by the author covers less than forty years, he feels entitled and able to say that, while Private International Law during the nineteenth century was directed by the idea of the "personnalité du droit," produced by the democratic liberalism of the time, a renaissance of territorialism and a further progress of the power of the parties' autonomous intention is discernible.

The comparative lawyer can only note such statements. As far as he is concerned, the real value of the book does not lie in these parts, but in its detailed description of the law and its development.

It is with great regret that some real defects in the book must be mentioned. They are of a merely technical nature, but they make themselves grievously felt. The first part is devoted to a description of the methods employed by the Courts in making use of the traditional material such as Codes, theoretical research, customary law. The second describes the period from 1900 to 1918, the third that from 1918 to 1937. This somewhat arbitrary division into two periods of only eighteen years each involves both repetition and separation. Most problems are discussed twice, and as there are neither cross-references nor an index, this large, perhaps too large, volume loses much of the attraction which its learning and richness would seem to deserve.

F. A. MANN.

PARLIAMENTARY GOVERNMENT IN ENGLAND. By HAROLD J. LASKI. London: George Allen & Unwin, Ltd. 1938. 453 pp. **12s. 6d.**

The author emphasises in his Preface that this is not a formal description of the working of parliamentary government in England, but that it is a commentary on "those aspects of its working which are most relevant to the pressing problems of our time." It is taken for granted that the reader knows the main outlines of our governmental institutions. The chief theme is expounded in Chapter I. It is to the effect that the English cabinet system of government has been successful so far because it has been backed by economic success; the period of expanding capitalism enabled the ruling class to make sufficient concessions to the ruled so that crisis could be avoided. Bagehot's proposition that the possessing class "must willingly concede every claim they can safely concede" gives the key to that phase. In the period of expansion there appeared to be no cleavage of opinion as to the basis of society. Lord Balfour's saying that "Our whole political machinery pre-supposes a people so fundamentally at one that they can safely afford to bicker" is essentially correct. "Since 1689, we have had, for all effective purposes, a single party in control of the State. It has been divided, no doubt, into two wings. It has differed within itself upon matters like the pace of change and the direction of change; it has never seriously differed upon the fundamental principles of change" (p. 93). We are now entering upon a phase in which the possessing class no longer feels that it can "safely" give further concessions. The Labour Party in working for the transformation of the economic basis of society cannot be fundamentally at one with its political opponents. If the presupposition of our political machinery no longer exists, or is seriously impaired, we certainly cannot bicker with safety. More specifically (p. 85 *seq.*), could a Labour Party victorious at the polls expect to be able to carry through their policy peacefully?

The reader who accepts the premisses will find a convincing commentary upon our political institutions. If the premisses are not accepted (and I presume that a Conservative must reject them or be converted from his Conservatism) that does not dispose of the book; most of the analysis of the present working of institutions, and particularly Chapter V on the Cabinet, is brilliant exposition that holds good whatever view is taken on

other matters. My only criticism is that Professor Laski might have given fuller documentation.

The handling of the introductory portion is open to some question. To those on the left the arguments are familiar; through countless books and discussions the left-winger comes to accept these views, and they then appear elementary and really self-evident. Would the man who has no such background find the summarised arguments satisfying? I doubt it, for (on the assumption that there are still minds open to conviction by rational political argument) he would be baulked by the severe condensation of what is necessarily a very large topic. Here again I think that lack of references is a pity. If argument must be condensed there is much to be said for telling the reader where he can pursue the matter further. For instance, part of Chapter I has been demonstrated at full length by the author in *The Rise of European Liberalism*, yet there is no reference to this. In Chapter VII on the Judiciary, where a great deal has to be said in a little space, there are adequate references for the doubting reader to satisfy himself, and the chapter definitely gains in weight by their inclusion.

Personally I have enjoyed this book immensely. It is an absolutely essential book for anyone who is interested in the realities of government.

R. M. JACKSON.

THE BRITISH CABINET SYSTEM, 1830-1938. By ARTHUR BERRIEDALE KEITH, D.C.L., LL.D., D.Litt., F.B.A., *of the Inner Temple, Barrister-at-Law, and Advocate of the Scottish Bar; Regius Professor of Sanskrit and Comparative Philology and Lecturer on the Constitution of the British Empire at the University of Edinburgh.* London: Stevens & Sons, Ltd. 1939. 648 pp. **15s.** net.

We have learned to expect a full-sized book from Professor Berriedale Keith every six months, and here is one on the British Cabinet System. The purpose of the book is to show in detail how the Cabinet system works at the present day, to note the conditions of its successful functioning, and to describe the relations of the Cabinet to Parliament, the electorate, the party system and the Crown. It is one more monument to the author's industry, versatility and encyclopaedic knowledge, for which all serious students of constitutional law and government will be grateful. Dr. Jennings's *Cabinet Government* appears to be the only other book devoted to this subject that has been published in England, and it is not our intention to compare the general merits of the two works, for on such an important subject there is ample room for both. Professor Keith is the more dogmatic in drawing conclusions from precedents. Their difference of method is most striking when it comes to dealing with the Cabinet as a co-ordinating factor, Dr. Jennings effecting a synthesis between the Cabinet and the various branches of the administration, while Professor Keith is concerned rather to analyse the structure and functions of the several Government Departments. Among the half-dozen references to the earlier work, Professor Keith (p. 357) only once expressly disagrees with Dr. Jennings on a matter of constitutional principle, and we think that here he misses Dr. Jennings's point with regard to the exercise on certain occasions of "personal prerogatives."

The book opens with a good explanation of the nature of constitutional conventions. Other matters of special interest are the selection of the

Prime Minister and his position within the Cabinet; the increasing authority of the Cabinet in government; the doctrine of the mandate; the dissolution of Parliament; the creation of peers; and the King's sources of information from the Cabinet and elsewhere. We may mention more particularly the reasons for the choice of Mr. Baldwin as Prime Minister in 1923; the distinction between the selection of a peer as Prime Minister and a Prime Minister retaining that office after being created a peer; the apt remark that the right to a dissolution "is not a right to a series of dissolutions"; the magnification of the office of Prime Minister at the expense of the Cabinet, and non-discussion with the Cabinet in relation to the dissolution of Parliament; and the effect of the Parliament Act, 1911, on the prerogative power of creating peers.

The difficulties that confront the author of such a book, and the labour involved, are enormous. The Cabinet system rests mainly on political conventions which are often indefinite and have to be inferred by no certain criterion from innumerable precedents, which in their turn are partly veiled in secrecy. The materials include the *Letters of Queen Victoria*, the Greville *Memoirs*, the Esher *Journals*, the Fitzroy *Memoirs* (each in several volumes), and biographies or memoirs of the leading public figures of the nineteenth and twentieth centuries, in addition to Parliamentary debates and papers. Unfortunately Professor Keith does not provide us with a bibliography, so that the reader is occasionally met with such questions as whether the Greville *Journals* (p. 23, note (*h*)) are the series referred to elsewhere as Greville *Memoirs* or *Greville*, and has to guess the identity of the book called *Guedalla*.

It is a pity that the book should be interspersed with the author's personal judgments on the policy and conduct of public men, which in the guise of epithets insinuate themselves so frequently that there is no need for us to give examples. Permeating the book, too, is the author's violent disapproval of Mr. Neville Chamberlain's foreign policy. Criticism in a work of this kind is only scientific so long as it reveals departures from constitutional practice; and in so far as it is based in this respect on an alleged breach of the government's "mandate," it begs the question whether a doctrine of the mandate is in practice generally accepted. We should have thought that if any proposal called for a general election it was the Abdication. In any event, foreign policy is the question on which the electorate is least competent to decide. The last chapter consists of a diatribe against the Munich Agreement, but up-to-the-minute journalism is soonest out of date.

O. Hood Phillips.

AN OUTLINE OF CONSTITUTIONAL LAW. By W. I. R. Fraser, B.A., LL.B., *Advocate, Lecturer in Constitutional Law at the University of Glasgow*. Edinburgh: William Hodge & Co., Ltd. 1938. 228 pp. **10s.**

The main differences between Scottish and English constitutional law lie in the system of Courts, the organisation of local government, and the procedure in actions against the Crown. Chapters 12 and 13 of this book deal exclusively with the civil and criminal Courts of Scotland, and Chapters 14 and 15 exclusively with Scottish local government, which has recently been reorganised much on English lines. In the discussion on proceedings against the Crown (Chapter 10) and the relations between

the citizen and the State (Part VI), the principles of Scots law and English law are contrasted. The composition of Parliament and the Privy Council is related to Scottish history. An account is given of the central government departments dealing with Scotland, and of the recommendations of the Gilmour Committee set up in 1936 to advise on their reform. References are to Scottish cases wherever possible.

It is remarkable that Dykes and Philip's *Chapters in Constitutional Law* should be the only other book on constitutional law written from the point of view of the Scottish lawyer. Mr. Fraser's work supplements the English textbooks in those respects in which they are deficient. The framework is very elementary, but clear and concise. We should think that this book would be indispensable as an introduction for all students of law in Scotland. English students also will find much useful information on matters of which they are, but should not be, ignorant.

O. HOOD PHILLIPS.

A CONSTITUTIONAL HISTORY OF BRITISH GUIANA. By SIR CECIL CLEMENTI. xxii + 546 pp. Macmillan & Co. **20s.** net.

Recent events have made this most complete monograph of first importance, for it is the belief of many that British Guiana will afford an outlet for the energies of a considerable number of refugees from Germany and Central Europe. There can be no question of the extent of its resources, or of its striking under-development. This volume, though a constitutional, and not a general history of the Colony, explains that under-development. From the first days of our acquisition of this Colony —as large as Great Britain—from the Dutch in 1803—it has suffered from a travesty of representative institutions, which vested political power in a tiny oligarchy of planters. If any advance in democratising these institutions were made, it involved the enfranchisement of a large majority of East Indians and Africans, illiterate and with no stake in the Colony. Accordingly, no substantial advance was ever made, and the Colony remained until 1928 in a constitutional *cul-de-sac*, in which misgovernment persisted and the Colony's resources remained undeveloped.

"The coastal interests dominated the administration, and, not unnaturally, the sugar planters and others whose interests were exclusively on the coast disapproved of spending the colonial revenues or private capital on objects which could not be expected to bring any immediate benefit to that coastal fringe, where all the sugar estates of the Colony are situated. Hence the roads and railways are coastal; and the chief works of the Colony, both public and private, have been drainage schemes and water-conservancy schemes for the benefit of the plantations and those who live on the coastal flats. Vast sums have been spent on defending the shore against the inroads of the sea. But any attempt to open up the interior has been looked at askance as likely to withdraw labour from the coast. There can, of course, be no doubt that the greatest asset of British Guiana at the present time is its sugar industry, and that a wise administration will safeguard that industry. Nevertheless it is also beyond doubt that, unless there is proper representation in the Colony's constitution for industries established in the interior, the back blocks of this 'magnificent province' will remain an unpeopled wilderness" (pp. 385–386).

In 1928 the old oligarchical constitution was abolished, and Crown Colony Government of the usual type was introduced, thereby restoring

confidence in the Colony's financial stability. The way is therefore open for a comprehensive development of the Colony, and it would be the height of folly if the opportunity were missed.

Sir Cecil Clementi has collected together all the available information upon the constitutional question, and none will dispute the accuracy of his diagnosis of the situation prior to 1928.

G. W. KEETON.

THE LAW OF NEGLIGENCE. By J. CHARLESWORTH, LL.D. Sweet & Maxwell Limited, 1938. **£2** net.

In the Preface to this work on *The Law of Negligence* we are told that "it was felt that instead of trying to bring Beven up to date . . . it would be better to make an entirely new book which could, moreover, be in one volume so as to be more convenient for practitioners."

If this means that Charlesworth on Negligence is offered as a substitute for Beven on Negligence (and the two works come from the same publishing house) let it be said at once that it is an inadequate substitute. The work of Dr. Charlesworth has naturally the advantage that it contains all the cases decided down to the beginning of 1938. In all other respects Beven (more particularly if one compares the third edition) is on a different plane of legal learning and analysis and authority. To take an example, the topic of Degrees of Negligence, which occupies some 24 pages in Beven, is handled by Dr. Charlesworth in a single paragraph (p. 5). One may perhaps also point to the rather summary treatment (at p. 8) of the relation between negligence and breach of statutory duty.[1] The adjustment of the doctrines of Common Law negligence and breach of statutory duty has, from the beginnings of modern statutory change, caused a certain malaise among Common Law judges and lawyers and may prove to be a matter of some social and even political importance if (as some observers think, such as Charles Bastide of the Ecole des Sciences Politiques et Economiques in his book *L'Angleterre Nouvelle*) one effect of our modern statutes is to create a differentiation between two classes of citizens, one the independent and fully responsible citizen, the *liber et legalis homo* of the older Common Law; and the other a dependent and less responsible citizen, the insured or insurable person of the modern statutes. One may perhaps detect the conflict of the two citizens and of the two philosophies in some of the earlier cases, like *Yarmouth* v. *France*, 19 Q.B.D. 647–650, and *Smith* v. *Baker*, [1891] A.C. 325, and in the hesitations of the law and of the decisions and dicta of the judges[2] in such more recent cases as *Flower* v. *Ebbw Vale*, [1936] A.C. 206, 214, 215; *Bailey* v. *Geddes*, [1938] 1 K.B. 156; *Chisholm* v. L.P.T.B., [1939] 1 K.B. 426; *Murray* v. *Schwachman*, [1938] 1 K.B. 130; *Lewis* v. *Denye* (1939), 55 T.L.R. 391; see especially the judgment of Lord Justice du Parcq and cases cited.

In brief, the work of Dr. Charlesworth is little more and does not pretend to be much more than a handy summary of decided cases intended for the use of the busy practitioner. And in this role it is a most useful and, on the whole, in the parts in which one has had occasion or opportunity to test it, as accurate a statement as may be of a rapidly developing department of the law.

The style is clear, though there are some traces of haste in the writing;

[1] There is a more detailed examination of this topic at pp. 338–343.
[2] Some of these matters are dealt with in Charlesworth at pp. 416–421.

the proof reading is well done, though a few errors have gone undetected (e.g. at p. 14, line (1) the word "builder" should presumably read "mortgagee"); and one finds here and there what appears to be an inaccurate statement of the law. Thus, *Hummerstone* v. *Leary* is not an authority for the whole of the proposition for which it is cited at p. 89. A Divisional Court has held (in an unreported case) that so long as he does not dismiss the action against one of two defendants at the close of the plaintiff's case, a County Court judge is entitled to say that he does not wish to hear evidence on the part of that defendant and proceed to hear the evidence of the other defendant, and on such evidence to decide the issue (*ex mea relatione*). Again, the statement of law in relation to owners of land for the fall of trees (p. 124) will need to be reconsidered in the light of the decision of the Court of Appeal in *Shirwell* v. *Hackwood*, [1938] 2 A.E.R. 1, which is cited in a footnote.[3] Further, it is conceived that the distinction between *Haynes* v. *Harwood* and *Cutler* v. *United Dairies* is not accurately stated at p. 459, though it is hinted at in the citation from Maugham, L.J. (as he then was) which is given on the same page. These cases (it is submitted) illustrate the scale of values that the Common Law observes and the greater liberty of action that it allows when life is in danger.

Other instances might be given of debatable propositions of law which are advanced in this volume. It would be unfair, however, to demand absolute accuracy of legal statement in a work which endeavours to compress the whole law of negligence into the compass of some 500 pages. It is necessary to be concise and, in certain cases, to be dogmatic on points that are more or less open to dispute. Suffice it to say that, taking it all in all, this is a valuable work for those for whom it is intended, for the advanced student and for the busy practitioner who wants a book of ready reference to the decided cases in this branch of the law.

RICHARD O'SULLIVAN.

A DIGEST OF ENGLISH LAW. By EDWARD JENKS (Editor), the late W. M. GELDART, R. W. LEE, SIR WILLIAM HOLDSWORTH, SIR JOHN C. MILES, WILLIAM LATEY. Third Edition. 2 vols. cclx vii—1258 — 120 pp. London: Butterworth & Co., 1938. **70s.**

In 1902 the suggestion was made by the Internationale Vereinigung für vergleichende Rechtswissenschaft of Berlin that a leading English legal scholar should write a book on English law in which the elements of those of its parts which are usually treated in the continental countries in the "code civil" should be stated in the system and as far as possible in the form of a Continental Code. It is the merit of Professor Jenks to have taken up that suggestion, and the present work, in which together with him a team of scholars took part whose eminence appears from their mere names, is the result. Of its success there can be no doubt: besides three English issues the book has appeared in two French editions and on its first 700 sections a German commentary has been published, covering —with German thoroughness—not less than 2000 very closely printed pages. Its main users are probably foreign members of the profession who desire quick and reliable information on elementary points of English law and who will no doubt find this task made much easier by the present work which approximates the sort of law book to which they are

[3] See the examination of this decision by C. J. Hamson in *Modern Law Review*, Vol. II, pp. 215–221

accustomed. But the frequency with which the former editions, both English and foreign, are quoted also in comparative monographs and ordinary textbooks shows that continental scholars, too, have availed themselves of this easily accessible source of information. That the new edition, which is largely completely rewritten and embodies already the Matrimonial Causes Act, 1937, will find equal favour is undoubted.

The system of the book is that of the German Civil Code This has unfortunately led to the omission of some subjects which could not be dealt with in that code because they constitute peculiarities of English law. A few sentences on the fundamental distinction of common law and equity might have been useful, and a section on the main rules of interpretation of statutes and documents would have been a boon to many users. On several occasions the system is not strictly adhered to, and this has sometimes led to repetition and sometimes to a misplacement of rules which may cause some confusion. The sections on "Agency" in the general part and "Master and Servant" in the second are an example: most continental lawyers will find that the short sections on the liability of a master for the torts of his servants in the chapter on agency (Nos. 149 and 150) are superfluous, but they will probably search in that chapter for the rules on the determination of authority and will note with surprise that they are partly to be found here and partly in the chapter on Master and Servant. Some readers might perhaps be misled into believing that only the rules in the former chapter refer to "représentation" or "Vertretung," while those in the latter concern the "mandat" or "Innerverhältnis" solely. Again few continental readers will turn to the "law of property" for some of the rules on assignment of debts and it is not impossible that many of them will overlook s. 1676 which reports the rule of s. 25, Judicature Act, 1873 (now s. 136 (1), Law of Property Act, 1925), especially after having been informed by s. 329 under the heading "Assignment of Contract" that "except when the law provides otherwise in special cases, an assignment of a right arising out of a contract may be effected by mere agreement between assignor and assignee." It is true that the rule of s. 25 does not properly fit into the law of obligations as it covers choses in action generally. It should, however, have found its place in the general part of the book whose scantiness the learned editor himself deplores.

That a book of this character can only bring a judicious selection from the vast material of English case law and statutes is self-understood. It is equally self-understood that not every critic can possibly agree with every detail of the selection made. The present writer has been surprised to miss in the title on limitation of actions a reference to s. 19, 4 Anne, c. 16 (defendant beyond the seas). Here and there either a greater strictness in terminology or an open avowal and explanation of necessary duplicity might have been advisable: the word " condition," for example, is in the same chapter used sometimes in the sense of the Roman *conditio* (s.120,125), and sometimes in the sense of a term of agreement (ss.122,126 127), while in the chapter on sale of goods it is employed in a third meaning, i.e. as opposed to a mere warranty. It is submitted that the distinction between condition and warranty ought to be found in the general part of the law of obligations, not in the chapter on sale of goods.

Some of the rules as stated appear somewhat too broadly drafted, a fate which probably befalls every, but the bulkiest, textbooks; similarly a few *lapsus* are inevitable: among the more regrettable ones may be

mentioned that fraud is missing among the grounds on which an agreement may be avoided (s. 89), although its definition is found in its proper place (s. 92) and that the rule in *Carter* v. *Silber*, [1892] 2 Ch. 278, is erroneously restricted to liabilities of a minor incurred since majority (s. 54).

These little blemishes do not, however, detract from the merits of this great work. It would indeed be difficult to recommend to foreign lawyers a better guide through the maze of English law than this Digest. But other readers than these, too, might find it useful to study English law in a different garb: the present writer has to confess that few things have more strongly convinced him of the logical impossibility of the rule in *Donoghue* v. *Stevenson* than a perusal of Sir John Miles' succinct restatement, which makes it plain that the supposed duty to take care is nothing but a fiction invented solely to form the basis of a new tort which itself constitutes the sole legal consequence of the supposed duty. It may look like a slip, but it is in reality a frank admission of this logical impossibility that Sir John summarises the rules enumerating the cases in which such duties are supposed to exist under the obviously inappropriate heading "Standard of diligence."

ERNST J. COHN.

THE LAW RELATING TO COMPETITIVE TRADING. By D. KNIGHT DIX. Sweet & Maxwell, Ltd. 1938. xx + 224 pp. **15s.**

The world suffers to-day from too many books, very often the product of too little thought. It is a pleasant duty, therefore, to welcome a new book which has a real contribution to make. Miss Dix would not claim that her book makes any addition to existing knowledge, but it is the first attempt in England to present the law relating to business competition as a comprehensive whole.[1] The book is divided into four parts: Part I, Trade Interference, which deals with Intimidation and Conspiracy; Part II, Price Maintenance; Part III, Competition at the Hands of Former Employees, where the author deals with agreements in restraint of trade; and Part IV, Detriment to Goods and Trade Reputation, i.e. what may be described as "trade defamation" and passing-off.

In her Introduction the author at once provokes and disarms criticism by citing with approval a dictum of Viscount Finlay that it is not for any tribunal to adjudicate as between conflicting theories of political economy and adopting this artificial detachment for herself as a textbook writer. It is now trite learning that the judicial process involves a selection between competing principles, which is governed to a greater or lesser degree by the conscious or unconscious predilections of the judge in matters of social policy. And in no field is this fact more easily demonstrable than in the case law dealing with trade relations. The subject is essentially economic in character and the opinions of the judges are necessarily conditioned usually consciously, sometimes, perhaps unconsciously, by their view of public policy. Thus the Courts are constantly being asked to decide whether a restraint is reasonable in the interests of the public—a decision which inevitably involves the weighing of economic and social policies. No one, for example, can read the judgments of Lord Parker

[1] Though, elsewhere, I have attempted an outline of the subject in this country and the U.S.A., *Journal of Comparative Legislation*, Vol. xix, Part 1, pp. 38 *et seq.*: Vol. xx, Part 1, pp. 29 *et seq.*

in *Att. Gen. for Australia* v. *Adelaide S.S. Co.* or in *N.W. Salt Co. Ltd.* v. *Electrolytic Co. Ltd.* or of Lord Haldane in the latter case without being aware of this. More notoriously the confusion and contradictions of the conspiracy cases are a reflection of the differing social views of the judges concerned in them. In America and in Australia the nature of the problem has been recognised by setting up commissions consisting of lawyers, economists and businessmen to decide questions of unfair competition and trade restriction. In so far as the American legislation has proved unsatisfactory this is due almost entirely to the way in which the courts have approached the task of construing the statutes. The decisions betray a lack of guiding principle and a failure to appraise the economic significance of the problems that arise. To impute Olympian detachment to the judge, then, is a source of error and confusion, and it is equally unwise for the text-writer or legal adviser to ignore the factors at work behind the printed word. The most vital and the most difficult task of the legal adviser is to prophesy what the courts will do; the discharge of this duty involves a searching understanding of the forces which shape the development of the law.

Thus the author of this book has imposed upon herself a limitation which necessarily detracts from its value as a contribution to academic thought and diminishes its value even to the practitioner. In the result it is no more than a catalogue of a large number of decided cases and relevant statutory provisions. This work of listing and exposition has been done with care and ability, and Miss Dix is to be congratulated on the industry with which she has abstracted all the relevant material. More valuable than anything else is the information—hitherto not easily accessible—she has collected as to the price maintenance agreements of certain important trade associations, notably, the Tobacco Trade Association, the Proprietary Articles Trade Association, and the Motor Trade Association.

One or two points of detailed criticism may also be ventured. *South Wales Miners Federation* v. *Glamorgan Coal Co.* should be cited as, together with *Quinn* v. *Leathem*, setting the seal of the approval of the House of Lords on *Lumley* v. *Gye* and *Bowen* v. *Hall* (p. 58). In the same section, Interference with Contractual Relations, Prof. Lauterpacht's article in *Law Quarterly Review*, 1936, page 494, should be referred to and the question of justification should be more fully discussed. The *Taff Vale Case* is also too briefly disposed of and no mention is made of the difficulties to which it may still give rise notwithstanding its partial repeal. A short paragraph does not exhaust the possibilities of the Trades Disputes Act, 1927. Pollock's doubts as to "the magic of plurality" are noted at page 81, and it would have been interesting to cite in that connection the decision in *Northern Securities Ltd.* v. *U.S.*, 193 U.S. 197 (Holmes, J., diss.) that a combination by way of fusion comes under the ban of the Sherman Act, and to point out that the *Standard Oil Case* concerned a fusion of undertakings into one corporation. In the short discussion on *Dunlop* v. *Selfridge* a few speculations on the Sixth Interim Report of the Law Revision Committee would have been profitable.

E. WYNDHAM WHITE.

CONSIDERATION IN THE LAW OF SIMPLE CONTRACT, being the Lee Essay Prize of Gray's Inn for 1938. By J. WICKS. London: Stevens & Sons, Ltd. 1939. xi + 78 pp. **5s.**

THE LAW RELATING TO UNINCORPORATED ASSOCIATIONS, being the Yorke Prize Essay for 1937. By D. LLOYD. London: Sweet & Maxwell, Ltd. 1938. xvi + 248 pp. **21s.**

In the preface to *Land in Fetters*, Lord Justice Scrutton said: "These pages bear the additional stigma of being a Prize Essay, and it is a commonplace of criticism that from that source no good thing can come." The trouble is that though the essay may deserve the prize, it does not follow that it should be published, and Mr. Wicks' essay is a case in point. On the historical side, it contains nothing which cannot be found in Ames, Pollock and Maitland, and Holdsworth, and it is not convincing either in the use of Year Book materials or in the way in which the complicated history of assumpsit is expounded. Mr. Wicks is more original but less sound in the chapter in which he criticises the recommendations of the Law Revision Committee about consideration. For instance, his remarks on p. 59 ignore the existence of cases such as *Webster* v. *Cecil*, and on p. 66, his discussion of the suggestion that "a promise made in consideration of the promisee performing an act shall be enforceable as soon as the promisee has entered upon the performance of the act," is based on a misunderstanding of the agency cases like *Trollope* v. *Martyn*. The book is carelessly edited, and one cannot agree with Mr. Grant-Bailey who says in the foreword that it "is invaluable to the practitioner."

On the other hand, Mr. Lloyd's essay on Unincorporated Associations is a work of real utility. It is obvious that he has a first-hand knowledge of the authorities on his subject, and he has presented his material in a most interesting form. He begins with a discussion of legal personality, and he has obviously been very much influenced by the number of associations to which English law has granted recognition falling short of corporate status. He comes to the conclusion that there is "no reason why there should not be varying degrees of personality which can be conceded to each particular association or class of association, according to the exigencies of the particular case." He goes on to describe the various types of unincorporated associations, and the section on trade unions can be warmly recommended. His description of the attitude of American courts to trade unions is misleading, for though he mentions the fact that the Anti-Trust laws have been invoked against combinations of workmen, he gives no hint of the protracted struggle, illustrated by cases like *Truax* v. *Corrigan*, to outlaw the injunction in labour cases—a struggle which has recently culminated in the passing of the Norris-La Guardia Act. He deals at length with the creation of unincorporated associations and their liability in contract and tort. There is a good explanation of how the trust has been utilised to enable such associations to hold property, and the difficulty caused by the rule that the beneficiaries of a trust must be ascertained is squarely met. The chapter on Conflict of Laws is excellent, though we must point out that the decision of the Supreme Court of the United States in *Great Southern Fire Proof Hotel* v. *Jones*, reported, by the way in 177 and not 117 U.S., was mainly determined by constitutional considerations—the desire to restrict the diversity jurisdiction of the federal courts and the tendency to follow the construction put upon a State statute by the highest tribunal of that State. The Yorke Prize Essays have on many occasions in the past enriched our legal literature, and Mr. Lloyd's book worthily maintains this high tradition.

D. W. LOGAN.

MARINE POLICIES. By W. H. Eldridge. Third edition by HARRY ATKINS. Pp. xlviii, 291, and 20. London: Butterworth & Co. (Publishers) Ltd. **30s.** net.

Considering the importance of the law of marine insurance the absence of good text-books is remarkable. After the classic work of Arnould this volume is perhaps the best; though the notes by Chalmers to his edition of the Marine Insurance Act, 1906, are so good that many practitioners find them sufficient for their daily needs. Eldridge, despite a few references to Grotius, Puffendorf and others, is not a scholarly book. It makes no attempt to expound and discuss the principles on which marine insurance is based. It does, however, contain a great deal of information lucidly set out, more or less in conformity with the scheme of the Act itself, and the principles are there for anybody who has had some preliminary training in the subject to discover, so to speak, in operation, for himself.

The present edition is a somewhat ill-balanced performance. While the recent cases have been noted up, several of the most important of them are not discussed, but receive a mere citation (cf. *Glen Line Ltd.* v. *A.-G.* (1930), 36 Com. Cas. 1). Again certain topics of great interest on which light has been shed is recent cases such as that of constructive total loss of freight (as to which see *Carras* v. *London and Scottish Assurance Corporation Ltd.*, [1936] 1 K.B. 291, and *Kulukundis* v. *Norwich Union Fire Insurance Society Ltd.*, (1936), 52 T.L.R. 591) are left much as they were in the past, the editor appearing to be oblivious of the developments.

One of the most useful features of this book is that it not only gives in an appendix a well-chosen selection of the Institute clauses, but that it contains in the text a critical discussion of a number of the most important of them. Here again, however, the work is ill-balanced, for while several of the clauses relating to hulls are considered at some length, the cargo clauses are almost ignored, some being mentioned without exposition in footnotes, others, as far as we have been able to find not being referred to at all. Considering the vital importance played by the Institute Clauses in modern marine insurance the time has come for a thorough and systematic discussion of them.

R. S. T. CHORLEY.

GATLEY, **ON LIBEL AND SLANDER** (O'Sullivan).

HUGHES, **THE LAW RELATING TO ROAD USERS' RIGHTS, LIABILITIES AND INSURANCE.**

Cf. pp. 335, 356 above.

The above-mentioned books are published by Messrs. Stevens & Sons with Messrs. Sweet & Maxwell. The price of Gatley is **63s.**, not as indicated **52s. 6d.**

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UNDUE INFLUENCE AND COERCION

EQUITY'S terminology has often brought confusion to common lawyers. Undue influence is one instance. The scope of the doctrine of undue influence has frequently been misunderstood. In *Mutual Finance Ltd.* v. *John Wetton & Sons Ltd.*,[1] Porter, J., after pointing out that the right to avoid a contract is not at the present time confined to cases of duress, remarks that "it depends on the much wider relief given on principles originally evolved in the Chancery Courts under the name of undue influence." He goes on to say that "duress at common law could only be pleaded where the end arrived at was achieved by the use of something in the nature of unlawful force or the threat of unlawful force against the person of the other contracting party. Undue influence in the Chancery Courts might exist where a promise was extracted by a threat to prosecute certain third persons unless the promise were given."[2]

Although the term undue influence has sometimes been used in a very wide sense, even by Chancery judges, its meaning has now become fixed and definite. It is not comparable to such a general principle as public policy or fraud in equity but expresses an independent rule of law. The rule has recently been thus stated by Scrutton, L.J.: "In the Court of Equity in case of a benefit or contractual advantage obtained from a person coming within certain defined relations, such as the relation of parent and

[1] [1937] 2 K.B. 389.
[2] *Ibid.*, pp. 394, 395.

young child, solicitor and client, religious superior and inferior, by the related member of that class, it is enough to prove the existence of such a relation to throw on the recipient of the advantage the burden of proving independent advice to the donor and in other respects justifying the transactions."[3] This is not a complete statement because the rule of undue influence extends to other relationships than those to which a special name may be given. Nevertheless it is confined to a relationship which necessarily involves influence by one party over another. The influence of the dominant over the weaker party may be either properly used or abused. There may be a right use as well as an abuse of the influence naturally springing from the relationship. Unless the inferior party is adequately protected equity presumes that the influence has been abused. This does not mean that there is anything similar to duress at common law or that consent is overborne. The principle is distinct from several others that at first sight may present an analogy.

1. Undue Influence in Equity

The rule of undue influence was first enunciated with respect to the relationship of parent and child. Lord Hardwicke appears to be responsible for the term. In *Morris* v. *Burroughs*[4] he said: "As the parental authority is great, to prevent any undue influence it may have in prejudice of the children, there must, in all cases of this kind, be a valuable consideration moving from the father, and an actual benefit accruing to the child."[5] This is the first instance of the use of the term. In some earlier cases the power of the parent had been expressed by the word "awe," as in *Duke of Hamilton* v. *Mohun* where Cowper, L.C., said with respect to an agreement which was a fraud on a marriage settlement, "The heir is under the awe of his parent in such a case, and not supposed to act freely."[6] On the other hand in *Blunden* v. *Hester*, with respect to the argument that a child was not *sui juris* because of "the awe he was presumed to have of his parent," Parker, L.C., said, "I do not see the argument from the father's power over the child to be of any weight; for if it should ever appear that this power has been abused a court of equity would certainly set aside the release thus indirectly gained."[7] In other words, although the child is a free agent he may be to some extent

[3] *Lancashire Loans Ltd.* v. *Black*, [1934] 1 K.B. 380, 404. We are not concerned with the question whether proof of independent advice is invariably required.

[4] (1737), 1 Atk. 398; West t. Hard. 242.

[5] 1 Atk. 403.

[6] (1710), 1 P. Wms. 118, 121.

[7] (1720), 1 P. Wms. 634, 639.

under parental power and equity will interpose if this power is misused for the parent's own ends. After the decision of Hardwicke, Strange, M.R., could say, "Though there is no very great evidence of undue influence, yet the court will always look with a jealous eye upon a transaction between a parent and a child just come of age and interpose if any advantage is taken."[8]

It was soon made clear that the new rule rested on the likelihood of misuse of the influence attending the parental relationship and not on coercion on a particular occasion by some specific means. In a case in which Hardwicke held that a female servant had gained "as much authority as a guardian" over a young woman he ordered an inquiry into a transaction between them, remarking, "There is strong proof of the general influence which may be gained by proper services, and made proper or improper use of."[9] Northington, L.C., referred to an agreement as "obtained by undue means, and under an improper exertion of paternal influence," holding that "where a father unduly compels a child by paternal influence, the court ought to be strictly rigid in guarding against it."[10] Thurlow, L.C., explained that the court did not permit a guardian to "avail himself of the habits of intimacy and influence (the true honest and just influence as it is in itself) he might have in the mind of an infant or child coming of age."[11]

The modern statements of the law regarding parents, guardians and others *in loco parentis* confirm the true doctrine in unmistakeable terms. In *Berdoe* v. *Dawson*, Romilly, M.R., said that the father "must prove not only that the son understood the transaction, but also that the benefit was not obtained from him by the undue exercise of the peculiar influence possessed by a father over his son."[12] The Court of Appeal in Chancery has expressed itself similarly: "Influence is a thing which is assumed as between parent and child—not that the influence is assumed to be unduly exercised, but the influence is assumed and it is then thrown upon the father, if he takes any benefit, to prove what is called the righteousness of the transaction. . . . When we talk of parental authority we do not think of terror in connection with it—that is not the primary idea—it is not terror and coercion, but kindness and affection, which bias the child's

[8] *Cocking* v. *Pratt* (1750), 1 Ves. Sen. 400, 401.
[9] *Cole* v. *Gibson* (1750), 1 Ves. Sen. 503, 509.
[10] *Wycherley* v. *Wycherley* (1763), 2 Eden 175, 177, 180.
[11] (1784), *Welles* v. *Middleton*, 1 Cox 112, 125.
[12] (1865), 34 Beav. 603, 604, 605. It was a case of a family arrangement and Romilly, M.R., held that "it may be a very proper thing that the influence of the father should be exercised so as to induce an elder son to make a proper and permanent settlement, when he comes of age, for the benefit of the family," p. 606.

mind."[13] Farwell, J., in *Powell* v. *Powell* may also be quoted: "On the authorities it appears to me not to be a question of actual pressure, or deception, or undue advantage, or want of knowledge of the effect of the deed. The mere existence of the fiduciary relation raises the presumption, and must be rebutted by the donee."[14] He adopted the words[15] of Bowen, L.J., in *Allcard* v. *Skinner*: "This is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play." Undue influence does not negative consent by the donor. Equity acts because there is want of conscience on the part of the donee, not want of consent on the part of the donor.

The relationship of solicitor and client was first made subject to the doctrine of undue influence so as to nullify a gift by Thurlow, L.C., in *Welles* v. *Middleton*.[16] In an earlier case Hardwicke had set aside a gift from a client giving as one of his reasons "the great power and influence that an attorney has over his client,"[17] but the attorney had taken advantage of his client's distress: it was really a case of imposition. Gifts made *pendente lite* had been set aside[18] before *Welles* v. *Middleton*, but there the donee was employed simply as a general legal adviser. In holding that he could not take a gift, Thurlow, L.C., said: "There would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hands, if it were not so: but once extricate him and it may be otherwise."[19] This reasoning from the existence of influence in the professional relationship has been repeatedly adopted. "The solicitor is considered to have an amount of influence over the mind and action of his client which, in the eye of this court, while that influence remains, makes it almost impossible that the gift can prevail. The principle of influence vitiates the gift."[20] In *Morgan* v. *Minett*,[21] Bacon, V.C., said: "You cannot inquire how much influence there was; it is enough, in the contemplation of the law, that the influence existed, that there is a possibility that it may be abused." In the often quoted case of *Wright* v. *Carter*[22] the principle is explained on the same lines.

[13] *Turner* v. *Collins*, 7 Ch. App. 329, 339, 340, *per* Hatherley, L.C.
[14] [1900] 1 Ch. 243, 246.
[15] (1887), 36 Ch.D. 145, 190.
[16] (1784), 1 Cox 112, aff. H.L.
[17] *Walmesley* v. *Booth* (1739), 2 Atk. 27, 29.
[18] *Drapers' Co.* v. *Davis* (1742), 2 Atk. 295; *Saunderson* v. *Glass* (1742), 2 Atk. 296.
[19] 1 Cox 112, 125.
[20] *Re Holmes' Estate* (1861), 3 Giff. 337, 345, *per* Stuart, V.C.
[21] 6 Ch.D. 638, 647.
[22] [1903] 1 Ch. 27, C.A.

Other special relationships need only be briefly noticed as the same reasoning has been applied to them as to the parent and child and solicitor and client cases. A spiritual adviser was held to be within the principle in the leading case of *Huguenin* v. *Baseley*. Romilly's argument has been widely accepted[23]: "The relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another; and this case discovers one of a very peculiar nature: influence obtained through the sacred character of a minister of religion." In *Nottidge* v. *Prince*,[24] Stuart, V.C., declared that "No person who stands in a relation of spiritual confidence to another so as to acquire a habitual influence over his mind can accept any gift or benefit from the person who is under the dominion of that influence, without the danger of having the gift set aside." In a familiar case of spiritual influence, Cotton, L.J., explained that the court interferes "to prevent the relations which existed and the influence arising therefrom being abused."[25] Cottenham, L.C., adopted Romilly's argument when the rule was, for the first time, extended to cover a doctor who had procured an agreement "by some dominion exercised over his patient."[26] Where two engaged persons were concerned, Langdale, M.R., treating it as a "case of first impression," held that the court "will not only consider the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used."[27]

In addition to special relationships known by a particular designation the rule applies where there is a personal influence, arising from the general circumstances, which has been used to benefit the dominant party. The influence must here be proved; it is not presumed. Hardwicke in *Bennet* v. *Vade*[28] found that there were "strong proofs of the defendant's power and influence over" the other party, that the defendant "had got an entire influence over him"; this was the main ground for setting aside a conveyance. *Bridgman* v. *Green*[29] is the leading case of influence existing *de facto*. A master was completely dominated by his

[23] (1807), 14 Ves. 273, 285, 286.
[24] (1860), 2 Giff. 246, 269.
[25] *Allcard* v. *Skinner*, 36 Ch.D. 145, 171. Kekewich, J., in the court below, said, "The law does not exclude influence. . . . But the law requires that influence, however natural and however right, shall not be unduly exercised," pp. 157, 158.
[26] *Dent* v. *Bennett* (1835), 7 Sim. 539, 4 My. & Cr. 269, 277.
[27] *Page* v. *Horne* (1848), 11 Beav. 227, 236. Followed by Maugham, J., in *Re Lloyds Bank Ltd.*, [1931] 1 Ch. 289.
[28] (1742), 2 Atk. 324, 326. At this date there was no presumption of influence although the defendant was an apothecary, as appears from a MS. report: Hardwicke Papers, B.M., Add. MSS. 36,016, p. 38a.
[29] (1755), 2 Ves Sen. 627, aff. Wilmot, 58.

butler who was treated as a confidential friend; a mass of evidence, including proof that the servant had induced the master to separate from his wife, established that influence existed. Hardwicke set aside a conveyance obtained by the servant "under the influence he had gained." Wilmot, C.J., affirmed the decision, as one of the Lord Commissioners, in an elaborate judgment. Holding that the master was "quite in a state of vassalage" to the butler he declared[30] that the court would interpose where "the donor is in such a situation with respect to the donee, as may naturally give him an undue influence over him." This wide extension of the principle has been thus described with the approval of the Court of Appeal: "Where those relations exist, by means of which a person is able to exercise a dominion over another, the Court will annul a transaction, under which a person possessing that power takes a benefit, unless he can shew that the transaction was a righteous one. It is very difficult to lay down with precision what is meant by the expression 'relation in which dominion may be exercised by one person over another.' That relation exists in the cases of parent, of guardian, of solicitor, of spiritual adviser, and of medical attendant, and may be said to apply to every case in which two persons are so situated, that one may obtain considerable influence over another."[31] Where a young man was under the ascendancy of an older and more experienced friend who encouraged him in extravagant living a voluntary settlement was set aside.[32] In *Morley* v. *Loughman*[33] the donee was placed in charge of the donor, a person of weak mind though of full capacity, managed all his affairs, and converted him to his own religious sect. Wright, J., annulled a gift "obtained by the exercise and abuse of personal influence and ascendancy established and maintained for that very purpose, under a cover of religion and religious brotherhood." He did not base his decision on the narrower ground of a relationship to spiritual adviser and devotee.

In some instances of *de facto* influence the dominant and weaker party are related to each other by blood or in other ways. But the presence of influence must nevertheless be proved as the

[30] Wilmot, 61.

[31] *Per* Romilly, M.R. (1851), *Cooke* v. *Lamotte*, 15 Beav. 234, 240, approved *Berry* v. *Glazebrook*, 7 T.L.R. 574. In *Fowler* v. *Wyatt* (1857), 24 Beav. 232, 237, Romilly, M.R., said, "Wherever the Court finds one of two persons exercising undue influence over the other, it will not allow a transaction resulting from or produced by it to stand. The relevancy of the relation of parent and child, guardian and ward, and the like, in such cases, is this: that from that relation it flows, as a necessary consequence, that a considerable degree of influence must exist, and if unduly exerted, then this Court interferes."

[32] *Cavendish* v. *Strutt*, 19 T.L.R. 483, following *Smith* v. *Kay*, 7 H.L. 750.

[33] [1893] 1 Ch. 736, 756.

family relationship is not on the same footing as parent and child. It is only a circumstance to be taken into account in determining if influence exists. The question has arisen where the parties were nephew and aunt.[34] Where an elder sister had "acquired a great ascendancy and influence over" a younger, Langdale, M.R., said[35] the influence "may be used, for good or for evil" and avoided a settlement for the elder's benefit. Brother and sister[36] and two brothers[37] have been concerned. Where a stepfather was concerned[38] the question asked was whether the benefit "was obtained by the undue exercise of influence of the stepfather." There is no presumption of undue influence in the case of husband and wife and there seems to be no actual decision[39] in which a husband's influence has been proved *de facto*, though dicta suggest that the burden of proof is not a heavy one in this instance. Hardwicke said[40] that where a wife's assignment benefits not a stranger but her husband "a Court of Equity will have more jealousy over it; and, therefore, if there is any proof that the husband had any improper influence over the wife in it by ill, or even extraordinary good, usage, to induce her to it, the Court might set it aside." The Privy Council has declared[41] that "It may be true that in some cases it is easy for the wife to discharge the onus which lies on her as on every one else outside the protected classes to show that a particular contract was, in fact, procured by the undue influence of her husband."

There has been a consistent enunciation of the doctrine of undue influence since it was first introduced. In all cases of its operation there is genuine consent but the parties stand towards each other in a relationship which involves influence. In the protected classes (which are fairly closely defined) the influence, ascendancy, or domination is presumed and the influencer must prove the righteousness of the transaction. In the other cases (where there may or may not be a family relationship) the influence, ascendancy, or domination must be proved. Undue influence is the misuse, the abuse, of influence. It is influence which is unduly exercised.

[34] *Cooke* v. *Lamotte* (1851), 15 Beav. 234.
[35] *Harvey* v. *Mount* (1845), 8 Beav. 439, 447.
[36] *Sharp* v. *Leach* (1862), 31 Beav. 491.
[37] *Sercombe* v. *Sanders* (1865), 34 Beav. 382.
[38] *Kempson* v. *Ashbee*, 10 Ch. App. 15, 21, *per* James, L.J.
[39] *Talbot* v. *Von Boris*, [1911] 1 K.B. 854, C.A., was a case of a husband's duress.
[40] *Grigby* v. *Cox*, 1 Ves. Sen. 517, 518.
[41] *Per* Lord Atkin, *MacKenzie* v. *Royal Bank of Canada*, [1934] A.C. 468, 475. See also the remarks of Alverstone, L.C.J., in *Howes* v. *Bishop*, [1909] 2 K.B. 390, 396, 397, C.A., and Russell, J., in *Shears & Sons Ltd.* v. *Jones*, 128 L.T. 218, 221.

2. Undue Influence and Wills: Coercion

Lord Penzance in the Court of Probate was certainly making an understatement when he said of undue influence: "It is very doubtful whether the same meaning is attached to those words in the Courts of Equity. In testamentary causes it is always defined as coercion or fraud, but *inter vivos* no such definition is applied."[42]

The Ecclesiastical Courts adopted the Chancery expression in the early part of the nineteenth century but gave it a new meaning. In respect of wills it was made equivalent to what has been variously described as importunity, pressure, constraint, restraint, fear, compulsion, and coercion. There is a surfeit of synonym in the old and the modern cases. In *Hacker* v. *Newborn*[43] it was held by the Upper Bench that "if a man make his will in his last sickness, by the over-importuning of his wife, to the end he may be quiet, this shall be said to be a will made by constraint and shall not be a good will." In 1752 the Prerogative Court refused probate of a will made by the "pressure and importunity" of the testator's wife.[44] When "undue influence" made its appearance in the Ecclesiastical Courts its significance is clearly explained. In *Williams* v. *Goude*, [45] Sir John Nicholl admitted a will which was claimed to have been wrongfully obtained by the testator's wife, saying that "The influence to vitiate an act must amount to force and coercion destroying free agency—it must not be the influence of affection and attachment—it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act: further, there must be proof that the act was obtained by this coercion —by importunity which could not be resisted;—that it was done merely for the sake of peace—so that the motive was tantamount to force and fear." Parke, B., in several Privy Council probate appeals explained undue influence by the analogy of common law duress: "The undue influence, and the importunity which, if they are to defeat a will, must be of the nature of fraud or duress"[46]; "The deceased did not sign it of her own free will, but by the undue influence and continued importunities of her husband, exercised towards her when upon her death-bed and

[42] *Parfitt* v. *Lawless*, L.R. 2 P. & D. 462, 465, during argument.
[43] (1654), Style, 427.
[44] *Lamkin* v. *Babb*, 1 Lee 1, 9.
[45] (1828), 1 Hagg. Ecc. 577, 581. In *Constable* v. *Tufnell* (1833), 4 Hagg. Ecc. 465, 485, the same judge said, "If importunity is to vitiate the instrument, the importunity must be proved, and proved to be of such a nature and degree that the deceased was unable to resist it—that his free-will and free-agency were destroyed, and that he acquiesced only for peace."
[46] *Barry* v. *Butlin* (1833), 2 Moo.P.C. 480, 484.

incapable of resisting it; such importunity destroying her agency, and amounting to a speciès of duress"[47]; "That species of duress which is commonly called undue influence."[48]

The leading case of *Boyse* v. *Rossborough*[49] confirms the new meaning. Lord St. Leonards, in delivering the judgment of the House of Lords, referred to "the difficulties of defining the point at which influence over the mind of a testator becomes so pressing as to be properly described as coercion" and held that "influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened."[50] Thus, undue influence for the purposes of the Court of Probate is wider than common law duress but narrower than undue influence in equity. It is coercion. Like common law coercion—duress—it negatives true consent. Unlike chancery undue influence it does not operate in spite of consent. Although some of the definitions go so far as to include fraud under the head of undue influence it is now settled[51] that a plea of undue influence only raises the issue of coercion; fraud in obtaining a will must be separately pleaded.

The undue influence alleged in *Boyse* v. *Rossborough* was that by a wife over her husband but it is clear that there is no presumption of influence over a testator even if he is a member of one of the protected classes known to equity. A few years before the leading case the Court of Appeal was asked[52] to extend its doctrine to wills by declaring that a solicitor who had benefited under a client's will which he had drafted was a trustee for the next of kin and heir. It was said to be the first instance[53] of such a case, and Turner, L.J., felt "some alarm at the consequences of the doctrine contended for," as he said that if it could be applied to the relation of solicitor and client, it must be applied to that of guardian and ward. The declaration was refused. Knight Bruce, L.J., explained[54] that the testator "meant to do what he did, and there is, I think, a total absence of evidence

[47] *Baker* v. *Batt* (1838), 2 Moo.P.C. 317, 329.
[48] *Browning* v. *Budd* (1849), 6 Moo.P.C. 430, 435. See also Dr. Lushington in *Stulz* v. *Schaeffle* (1852), Prer. Ct., 16 Sur. 909, pp. 910, 911 and 918.
[49] (1857) 6 H.L.2.
[50] *Ibid.*, 48, 49.
[51] *Parfitt* v. *Lawless*, L.R. 2, P. & D. 462.
[52] *Hindson* v. *Weatherill* (1854), 5 De G. M. & G. 301, reversing Stuart, V.C.
[53] *Per* Turner, L.J., *ibid.*, 313. But in *Raworth* v. *Marriott* (1833), 1 My. & K. 643, 645, Leach, M.R., had assumed that the doctrine did not apply.
[54] 5 De G. M. & G. 311.

to show that his intention in that respect was unfairly caused, unduly procured, or improperly induced. . . . It being impossible that a testamentary gift by a client to a solicitor can against the latter be liable to all the same considerations as a gift to him *inter vivos* would have been." A spiritual adviser, also, is not treated differently from any other devisee or legatee. In a case[55] in which a Catholic priest, who was the testator's confessor and manager of his temporal affairs, was allowed to benefit, Abinger, L.C.B., said: "I do not think that mere influence is enough to set aside a will. . . . It must be such a degree of influence, if you choose to call it by that name, as deprives the testator of being the proper master of his own faculties. A degree of influence arising from strong fear and from threats or menace, would, I think, be undoubtedly sufficient." In *Parfitt* v. *Lawless*[56] where a Catholic priest, who was the testatrix's resident chaplain and confessor, took under the will there was held to be no evidence of undue influence to go to a jury. Lord Penzance said that "the influence which is undue in the case of gifts *inter vivos* is very different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos* it is considered by the Courts of Equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence." He went on to remark that "undue influence as a term used in a plea in this court raises the question of coercion, and that only." As Sir P. J. Wilde had declared in a previous case,[57] "Pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened."

The onus of proving coercion is on those who allege it.[58] The character of the devisee or legatee in relation to the testator is only a minor factor to be taken into account in establishing

[55] *Middleton* v. *Sherburne*, 4 Y. & C. 358, 389, Court of Exchequer in Equity.
[56] L.R. 2, P. & D. 462, 469, 470.
[57] *Hall* v. *Hall*, L.R. 1, P. & D. 481, 482.
[58] *Parfitt* v. *Lawless*, L.R. 2, P. & D. 462; *Ashwell* v. *Lome* (1850), reported L.R. 2, P. & D. 477, in which Sir Jenner Fust held that the onus lay on a doctor who benefited, can be taken as overruled, unless he was also the preparer of the will. See *infra*.

coercion. But it may have some bearing on the question. It has been said[59] that if a man were "under the influence of such a superstitious terror or delusion as that he might think it necessary to his salvation that he should give all his money to his priest or confessor" it might be sufficient to set aside a will. Where the testatrix lived in a convent and benefited the nuns the jury found that the will was procured by undue influence; the Court of Appeal[60] refused to disturb their findings, Lindley, L.J., saying: "They may probably have regarded the testatrix as a person of so weak a mind as to be really coerced by the influence of the nuns." Undue influence has been proved against a doctor,[61] the test being, was the will made "in quiet submission in order to gain peace, and that the motive influencing her was force and fear? If so, that was sufficient to establish undue influence."[62] So it is clear that in all cases "to be undue influence in the eye of the law there must be—to sum it up in a word—coercion."[63]

There is another rule concerning wills which must not be confused with undue influence in any of its senses. If a person who prepares a will or who is responsible for its preparation benefits thereunder, it is treated as a suspicious circumstance and the court will refuse probate if not convinced that the testator understood what he was doing. Although the preparer of a will which is questioned on this ground is usually a solicitor it is not necessary to talk of undue influence. The rule is an independent one of ancient origin. Sir John Nicholl[64] compared it to the rule in Roman law by which *Qui se scripsit heredem* could take no benefit. He held that although in English law there was no absolute prohibition "his conduct must be watched as that of an interested person . . . *a fortiori* in a case where he is the confidential attorney of the deceased." A solicitor has been allowed to benefit in a case where "notwithstanding the suspicion, the balance of the testimony was sufficient to support the will."[65] In *Barry* v. *Butlin*[66] it is laid down that although the onus which is in all cases imposed on the party who propounds a will, is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents are presumed,

[59] *Per* Abinger, L.C.B., *Middleton* v. *Sherburne*, 4 Y. & C. 358, 390.
[60] *Hampson* v. *Guy*, 64 L.T. 778, 779.
[61] *In re Barlow*, [1919] P. 14; C.A., 131.
[62] *Per* Swinfen Eady, M.R., S.C. 35, T.L.R. 326.
[63] *Per* Sir James Hannen, *Wingrove* v. *Wingrove*, 11 P.D. 81, 82.
[64] *Paske* v. *Ollat* (1815), 2 Phill. Ecc. 323, 324; *Billinghurst* v. *Vickers* (1810), 1 Phill. 187. See also *Baker* v. *Batt*, 2 Moo. P.C. 317, 321, *per* Parke, B.
[65] *Wyatt* v. *Ingram* (1828), 3 Hagg. Ecc. 466, *per* Lyndhurst, L.C., supporting on petition for review the High Court of Delegates, reversing the Prerogative Court.
[66] 2 Moo.P.C. 480, 484.

"it cannot be that the simple fact of the party who prepares the will being himself a legatee, is in every case, and under all circumstances, to create a contrary presumption, and to call upon the court to pronounce against the will unless additional evidence is produced to prove the knowledge of its contents by the deceased." Parke, B., continues: "All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance, of more or less weight, according to the circumstances of each particular case." If the rule is no more severe than this, then the client has less protection than is given to him by the presumption of undue influence in *inter vivos* transactions. Lord Hatherley in *Fulton* v. *Andrew*[67] goes further saying: "There is a further onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of showing the righteousness of the transaction." Whatever the exact stringency of the rule may be, it supplements the probate law of undue influence where the beneficiary is also the preparer of the will. It has been applied in a case where the preparer of the will was the testator's doctor.[68] But the rule is not, and has never been, based on undue influence, even where the testator is a member of one of the protected classes known to equity.

It is unfortunate that the Court of Probate has not maintained its distinctive terminology as it has maintained its distinctive rules. If undue influence means coercion there is no reason why it should not be the accepted term. There is a long line of authority for coercion or some similar word to express a rule which is far older than the equitable doctrine of undue influence.[69]

3. Duress, Compulsion, Pressure

(*a*) *Common Law.* Common law duress being restricted to force and personal restraint, or the threat of such, has been supplemented by equitable principles. But common law itself gives a remedy on wider grounds than duress in the action for money had and received. If money has been paid under compulsion it may be recovered, though common law refuses to declare void an agreement made under the same kind of compulsion.

[67] L.R. 7, H.L. 448, 472. In *Finny* v. *Govett*, 25 T.L.R. 186, 188, C.A., Cozens Hardy, M.R., said, "He was unable to hold that the plaintiff had discharged the onus cast upon him by the law of showing the righteousness of the transaction, or that this paper propounded did express the true will of the deceased."

[68] *Greville* v. *Tylee*, 7 Moo. P.C. 320, judgment by Dr. Lushington. Nothing is said of showing the righteousness of the transaction.

[69] See *Swinburne on Wills*, 1611, ed. VII (5), (6).

What has been called compulsion,[70] duress of goods,[71] coercion,[72] and pressure,[73] is remediable if money has actually been paid over as a result of its exercise.

The leading case on the subject is *Astley* v. *Reynolds*[74] in which a pawnee refused to give up goods pawned unless the pawnor paid a sum in excess of the interest due; the pawnor paid and successfully brought *indebitatus assumpsit* to recover the excess charge, as it was "a payment by compulsion." The court refused to hold that because a bond could not be avoided by "duress of goods" the action failed; nor was the argument that the law had given him a remedy by action of trover accepted, because he "might have such an immediate want of his goods, that an action of trover would not do his business." The principle was explained by Abbott, C.J., in *Morgan* v. *Palmer*[75]: "It has been well argued that the payment having been voluntary, it cannot be recovered back in an action for money had and received. I agree that such a consequence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, 'That which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon anything like an equal footing." It seems odd, if compulsion nullifies a payment, that it should not also nullify an agreement to pay. Nevertheless the law is settled[76] that the party exerting compulsion can sue on the agreement, i.e. legally recover what the law would not have let him retain if paid over in the first instance. The point was fully discussed in *Skeate* v. *Beale*.[77] It was argued that no distinction should be drawn between an actual payment and a written engagement to pay, and that it was probable that a party would be more cautious in making a payment than in writing a memorandum. But Denman, C.J., distinguished duress to the person and duress of goods: "The former is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the

[70] E.g. *Maskell* v. *Horner*, [1915] 3 K.B. 106, C.A.; *Astley* v. *Reynolds*, 2 Str. 915.

[71] E.g. *Skeate* v. *Beale*, 11 Ad. & Ell. 983; *Parker* v. *British & Exeter Ry. Co.*, 6 Ex. 702; *Atlee* v. *Backhouse*, 3 M. & W. 633 ("species of duress or constraint"); *Oates* v. *Hudson*, 6 Ex. 346 ("species of duress"); *Owen & Co.* v. *Cronk*, [1895] 1 Q.B. 265, C.A.

[72] E.g. *Cartwright* v. *Rowley*, 2 Esp.N.P. 723.

[73] E.g. *Maskell* v. *Horner*, [1915] 3 K.B. 106, C.A. In *Green* v. *Duckett*, 11 Q.B.D. 275, "extortion."

[74] (1731), 2 Str. 915.

[75] (1824), 2 B. & C. 729, 734, 735.

[76] See Parke, B., in *Atlee* v. *Backhouse* (1836), 3 M. & W. 633, 650; *Oates* v *Hudson* (1851), 6 Ex. 346, 348; and *Parker* v. *Bristol & Exeter Ry. Co.*, 6 Ex. 702, 705.

[77] (1840), 11 Ad. & Ell. 983.

law for a remedy: a man, therefore, is not bound by the agreement which he enters into under such circumstances: but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert."[78] This reasoning would seem also to prevent recovery in actions for money had and received, but Denman, C.J., says, "the distinction between those cases and the present, which must be taken to be that of an agreement, not compulsorily but voluntarily entered into, is obvious." The agreement to pay can only be truly called voluntary if it is a genuine compromise[79] but it will usually not be. Further, in an action for money had and received there is "room for appeal to the law for a remedy," viz. an action of trover, yet another remedy is given, as was decided in *Astley* v. *Reynolds*. It was also said in that case that "where the rule *volenti non fit injuria* is applied, it must be where the party had his freedom of exercising his will, which this man had not: we must take it he paid the money relying on his legal remedy to get it back again."[80]

It is interesting to note that the Indian Contract[81] Act has taken the logical step of treating duress of goods as negativing consent to an agreement by a provision which is far wider than anything in the English authorities on duress. Sir Frederick Pollock remarks that "In England the topic of duress at common law has been almost rendered obsolete, partly by the general improvement in manners and morals, and partly by the development of equitable jurisdiction under the head of undue influence."[82] Cases of pure duress are certainly rare at the present day and equity certainly interferes on a wider principle: whether that principle is undue influence or some other, is the question now to be discussed.

(*b*) *Equity*. In the leading case on the subject, *Williams* v. *Bayley*,[83] the term pressure is mainly relied on. There is little doubt that undue influence in its usual sense does not apply. A father successfully sought to rescind a mortgage which he had executed in favour of a banker, on proof that he had been frightened into this action by the banker's uttering to him, not a threat

[78] *Ibid.*, 990.

[79] Gurney, B., took this ground in *Atlee* v. *Backhouse*, 3 M. & W. 633, 652.

[80] *Per curiam*, 2 Str 916.

[81] S. 14: "Consent is said to be free when it is not caused by—(1) coercion . . ." S. 15: "Coercion is the committing or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."

[82] Pollock & Mulla, *Indian Contract Act*, 6th ed., 92.

[83] L.R. 1, H.L.200.

but a warning, that he had it in his power to prosecute the son for forgery. The judgments of Cranworth, L.C., and Lord Westbury do not refer to undue influence but, in so far as they are not based on a consideration of public policy, they rest on the presence of pressure. Cranworth, L.C., referring to "this doctrine of pressure" said[84]: "It is not pressure in the sense in which a Court of Equity sets aside transactions on account of pressure, if the pressure is merely this: 'If you do not do such and such an act I shall reserve all my legal rights, whether against yourself, or against your son'," as distinct from an implied threat which he found to be present. Lord Westbury said[85] there were "two points of view, in which it may be regarded. One of them is, was the plaintiff a free and voluntary agent, or did he give the security in question under undue pressure exerted by the defendants? . . . Second . . . Was the transaction, taken independently of the question of pressure, an illegal one," by which he meant an agreement to stifle a prosecution. Lord Chelmsford held that "the agreement having been extorted from the father by undue pressure"[86] it ought to be set aside, but later in his judgment said that "the case comes within the principles on which a Court of Equity proceeds in setting aside an agreement where there is inequality between the parties, and one of them takes unfair advantage of the situation of the other, and uses undue influence to force an agreement from him."[87] It is clear that he is not using undue influence in its ordinary sense because that operates although there is true consent and even eagerness in the transaction, without anything in the nature of force, and he had previously explained that "the fears of the father were stimulated and operated on to an extent to deprive him of free agency, and to extort an agreement from him for the benefit of the bankers."[88] Undue influence is far removed from extortion. The principle of *Williams* v. *Bayley* is the equitable doctrine of pressure and there is no reason to explain it by undue influence, used only by Lord Chelmsford, casually, and in a peculiar sense. The doctrine is well described by Stuart, V.C., in the court below: "Where a power of operating on a man's fears exists, and he enters into a contract unwillingly and under the influence of that power, its existence constitutes pressure."[89] The word influence here clearly has nothing to do with the doctrine of undue influence.

[84] *Ibid.*, 212; 209.
[85] *Ibid.*, 216.
[86] *Ibid.*, 214.
[87] *Ibid.*, 216.
[88] *Ibid.*
[89] *Bayley* v. *Williams*, 4 Giff. 638, 661.

There is good authority both before and after *Williams* v. *Bayley* for pressure as a word of art indicating a distinct equitable principle. *Collins* v. *Hare*[90] is a solitary case decided on the ground of undue influence in the sense of pressure. A deceased assignor left a letter stating that certain assignments were "extorted from me by Mr. C by threats and undue influence," C, a clerk in his employ, having it in his power to ruin his character and the credit of the house by exposing frauds in the accounts. "Undue influence" gained a footing in the case from its use by the party; the common law judge in Ireland, trying the feigned issue at law, told the jury they might find that the assignments "were obtained by undue influence"; and on appeal from the Irish Chancery, Lyndhurst, L.C., not freeing himself from the words which the deceased had speeded on their way, said that "the evidence was strongly in support of undue influence."[90a] There were obviously threats, express or implied, of a prosecution. In *Osbaldiston* v. *Simpson*[91] securities given by the plaintiff to prevent a prosecution of himself for cheating at cards were cancelled, Shadwell, V.C., holding that "the plaintiff was induced to give the notes in consequence of his fears being wrought upon."[92] He does not mention undue influence. In *Ormes* v. *Beadel*[93] an agreement was entered into by a builder with a debtor under a threat by the latter that he would not otherwise pay what was due: he knew that the builder was in urgent need of money to pay his complaining workmen who had refused to continue work without their wages. Stuart, V.C., set aside the agreement, holding that "Where an agreement, hard and inequitable in itself, has been exacted under circumstances of pressure on the part of the person who exacts it, this court will set it aside."[94]

Subsequent cases leave uncertain the extent of the principle of pressure or coercion in equity. Romilly, M.R., attempted a generous definition: "Coercion takes an infinite number or forms, but it may properly be thus defined: the moment that the person who influences the other does so by the threat of taking away from that other something he then possesses, or of preventing him from obtaining an advantage he would otherwise have

[90] (1828), 1 Dow. & Cl., H.L. from the Ir. Ct. Ch., 139.

[90a] *Ibid.*, 150, during argument. But he later said, "All that the Equity Court had to do was to be satisfied that justice had been done . . . the substantial question on the issue was fraud or no fraud." The judgment proceeds on this basis.

[91] 13 Sim. 513 (1843). See also *Dewar* v. *Elliott* (1824), 2 L.J. o.s. Ch. 178.

[92] *Ibid.*, 514.

[93] 2 Giff. 166 (1860).

[94] *Ibid.*, 174. (Cp. the same judge's statement of the law of pressure a few years later in *Williams* v. *Bayley*, supra p. 111.) The decision was reversed by Campbell, L.C., but "most reluctantly," on the ground that the plaintiff had acted on the voidable agreement, 2 De G., F., & J. 333, 337.

obtained, then it becomes coercion and it ceases to be persuasion or consideration."[95] He applied this definition, holding it to be "strictly coercion," where the trustees of a will threatened a beneficiary who took a leasehold interest thereunder that they would prevent the lessor, whose actions they could control, from granting a renewal of the lease unless the beneficiary agreed to pay certain debts and annuities for the benefit of other persons who took under the will. The agreement of the beneficiary thus procured was set aside.[96]

If the threat by which pressure is exerted is a threat to prosecute for a criminal offence the contract thereby procured may be void at common law also, on the ground of illegality. This will be so if the contract amounts to an agreement not to prosecute. Thus where a forged bill was ratified by the forger's brother-in-law in consideration that there should be no prosecution the agreement was condemned at common law as it was "against public policy and void, as founded upon an illegal consideration."[97] On the other hand where[98] there was found to be no agreement to abstain from a prosecution a warrant of attorney given to secure a debt was not declared void by a Common Law Court although "the plaintiff held out threats of prosecution in order to induce the defendant to give the security for the debt."[99] This decision has been followed by the Court of Appeal which held that the principle of law laid down in *Williams* v. *Bayley* does not prevent a creditor from taking security for his debt by lawful means and that "a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt."[100] In a case[101] after the Judicature Act, which did not concern a transaction between debtor and creditor, the rule against stifling a prosecution was not relied on, yet promissory notes were declared unenforceable in the following circumstances. The defendants gave promissory notes to the trustee in bankruptcy of C, in payment of an alleged purchase by them of the

[95] *Ellis* v. *Barker* (1870), 40 L.J.Ch. 603, 607.

[96] *Ibid.*, p. 608, Romilly, M.R., incidentally remarks that the plaintiff "was unduly influenced to bind himself by deed to do what was required." The decision was affirmed, L.R. 7, Ch. App. 104, but on the ground of breach of duty by the trustees.

[97] *Brook* v. *Hook*, L.R.6, Ex. 89, 99.

[98] *Ward* v. *Lloyd*, 7 Scott N.R. 499.

[99] *Ibid.*, *per* Tyndal, C.J., 504. Coltman, J., said, "It is true there was a threat used by the plaintiff, and that that threat may have operated on the mind of the defendant . . . yet, in the absence of agreement" there was "no ground for setting it aside," 505.

[100] *Flower* v. *Sadler*, 10 Q.B.D. 572, *per* Cotton, L.J., 576. See also Brett, L.J., 575, and Coleridge, L.C.J., 573.

[101] *Seear* v. *Cohen*, 45 L.T. 589. Denman, L.C.J., said, p. 590, that if stifling a prosecution were the sole ground "it might be I should like to hear the evidence in the case more fully discussed."

bankrupt's stock in trade, under a threat of criminal proceedings against C who was the son of one and the nephew of the other defendant. Denman, L.C.J., said[102]: "The transaction is not a fair one. It is not to be looked at as a voluntary act, but as a case of extortion . . . the contract is not enforceable in equity, and the defence of duress is a good one"; it made no difference whether or not there were any real grounds for a prosecution as "the defendants were not free agents, but were coerced and forced into the bargain."

Further cases in the Chancery Division distinguish agreements to stifle a prosecution and agreements induced by pressure. Although a contract may be open to both objections it is necessary to maintain the distinction. In *Davies* v. *London & Provincial Marine Insurance Co.*,[103] Fry, J., allowed recovery of a sum of money that had been deposited with trustees as security for money due to a company from its agent against whom there were thought to be charges of felony pending. Basing himself on *Williams* v. *Bayley*, Fry, J., said that "illegality resulting from pressure and illegality resulting from an attempt to stifle a prosecution do not fall within that class of illegalities which induces the court to stay its hand, but are of a class in which the Court has actively given its assistance in favour of the oppressed party, by directing the money to be repaid.[104] Referring to the maxim *in pari delicto melior est conditio defendentis*, he said, "there is great difficulty in applying that principle to a case where money has been placed *in medio*, where the Court must do something with it, or else leave it to be locked up for ever," even assuming that the contract was illegal as compounding a felony. In another case of stifling a prosecution, Fry, J., ordered the return of securities which had been placed *in medio* in the hands of trustees, stressing the fact that there was "that amount of pressure put upon Mrs. A which always arises where there is a prosecution against a near relative or friend of the person who enters into the bargain."[105] This was a case of a wife who charged her separate property with loss caused by her husband's defalcations: in the previous case they were merely friends who were ready to make good the loss. The necessity of proving pressure as well as illegality if equitable relief is to be given was brought

[102] *Ibid.*, 590, 591. Huddleston, B., and Hawkins, J., gave judgment to the same effect.

[103] 8 Ch.D. 469. But the main ground of the decision was non-disclosure of material facts in a contract of suretyship. "Undue influence" is not mentioned.

[104] *Ibid.*, 477.

[105] *Whitmore* v. *Farley*, 43 L.T. 192, 197, Aff. C.A. 14 Cox C.C. 617; 29 W.R. 825. "Undue influence" is not mentioned.

out in a case[106] in which pressure was held not to be proved. Lindley, L.J., said that a plaintiff "in order to obtain relief in equity must prove not only that the transaction is illegal, but something more: he must prove either pressure or undue influence."[107] Bowen, L.J., was not satisfied that, if there were an agreement not to prosecute, "it would not properly follow as an inference of fact that there was undue influence and pressure."[108] In this dictum which, on the point of substance, is against the weight of previous decisions, undue influence and pressure seem to be treated as identical. It is one of the rare appearances of the phrase where pressure of prosecution is under discussion and is a departure from general usage. In *McClatchie* v. *Haslam*,[109] an agreement not to prosecute and pressure were both negatived on the evidence, with the result that a wife was not allowed to avoid a security given to her husband's employer for money which had been misappropriated. Lindley, L.J., described the action as one to set aside a security on the ground that "it was given under pressure; that is to say, threats of legal proceedings —criminal proceedings."[110] In *Barnes* v. *Richards*[111] where the jury had found that a settlement between employer and manager was not induced by threats of criminal proceedings for errors in the accounts, Alverstone, L.C.J., held that a further finding of "undue pressure" was not sufficient in law to nullify the agreement: the only possible pressure in law for the avoidance of the agreement was a threat to prosecute and this did not exist. In *Kaufman* v. *Gerson*[112] an agreement executed by a wife to prevent the prosecution of her husband was declared void expressly on the ground of "coercion" or "pressure." The ground that a prosecution had been stifled was not relied on but the case was decided "on the broad general principle that the Court will not enforce a contract which has been obtained by means of such moral coercion as was here used."[113]

[106] *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587; [1892] 1 Ch. 173, C.A.

[107] *Ibid.*, 182.

[108] *Ibid.*, 186. "Undue influence" is not mentioned by Fry, L.J., or Williams, J., in the court below.

[109] 65 L.T. 691; C.A.

[110] *Ibid.*, 692. "Undue influence" is incidentally mentioned by Lindley, L.J., in one part of the judgment but pressure is used throughout. Fry, L.J., again avoids the use of "undue influence" which Bowen, L.J., employs once in his judgment.

[111] 18 T.L.R. 328. "Undue influence" unfortunately appears in the headnote but nowhere in the judgment which refers to "pressure" alone.

[112] [1904] 1 K.B. 591.

[113] *Ibid.*, 599, *per* Collins, M.R., who uses both "pressure" and "coercion." "Undue influence" is not mentioned in C.A., but Wright, J., in the court below said the agreement "was obtained by the undue influence or duress of a threat to prosecute." ([1903] 2 K.B. 119.)

The decision in *Mutual Finance Ltd.* v. *John Wetton & Sons Ltd.*[114] discards the well established terms pressure and coercion in favour of undue influence. There was no direct threat by the plaintiffs to prosecute X for forgery but a private company, whose directors were the father and brother of X, gave a guarantee which the plaintiffs knew would not have been given but for the desire to prevent a prosecution. The guarantee was held not to be binding. The father was not aware of the possibility of a prosecution and the brother, if he alone had been concerned, would not have cared whether his brother were convicted or not, but he feared the effect on his father's health in the event of a conviction. Porter, J., said[115]: "If the known object was to prevent the prosecution of his brother for whatever reason, that, I think, is enough." The extent of the protection given by this application of the principle of pressure is not certain, but it seems that it is not confined to cases where the persons involved are the relatives of the alleged criminal. Protection has been given where "friends" as distinct from relatives were involved[116] and Porter, J., ruled that: "It is not necessary to determine the exact bounds beyond which the doctrine would not be applied, but I should myself be inclined to say that it extended to any case where the persons entering into the undertaking were in substance influenced by the desire to prevent the prosecution or possibility of prosecution of the person implicated, and were known and intended to have been so influenced."[117]

That there need be no direct threat for equity to interfere is shown in *Wheeler* v. *Sargeant*[118] where pressure appears in new surroundings. It was held that money paid to an executor by a beneficiary, in fulfilment of what was held to be a gratuitous promise to the executor, could be reclaimed. Romer, J., said[119] that "the Court will look with suspicion on such a transaction between executor and beneficiary, and will not uphold it save under exceptional circumstances—circumstances which negative any suspicion of misrepresentation, pressure, or unfairness, on the part of the executor . . . though there were no threats of any kind by the defendant, I think there was pressure in fact on his part, though not appearing in any form of words employed by him. His very position gave him the opportunity of putting pressure on the beneficiaries . . . I think that this document

[114] [1937] 2 K.B. 389.
[115] *Ibid.*, 396.
[116] *Davies* v. *London & Provincial, etc., Co.*, 8 Ch.D. 469, *supra*, p. 114.
[117] [1937] 2 K.B. at p. 396.
[118] [1893] 69 L.T. 180.
[119] *Ibid.*, 183.

was signed by the plaintiff partly from the fear that if he did not sign it, it would be the worse for him, owing to the defendant's position." Pressure is here used to cover what is somewhat similar to breach of duty by a trustee who seeks to profit by his trust. The decision may be regarded as an illustration of the tendency in equity to treat an executor in the same way as a trustee and as liable to the obligations attending a fiduciary position. If pressure be an instance of undue influence it is remarkable that the latter phrase is not used here: not even breach or abuse of confidence is relied on.

Whatever the limits of the doctrine of pressure the weight of authority is decidedly against describing it as undue influence and in favour of calling it pressure or coercion. This form of coercion has arisen chiefly where there are threats express or implied of criminal proceedings. There has been no case, for example, in which the compulsion by duress of goods which is sufficient in an action for money had and received has been held by equity to nullify an agreement. For this reason coercion in equity may be said to be narrower in its scope than testamentary coercion which covers many other threats than those of criminal proceedings. Further, a testator subjected to coercion is frequently on a sick bed and in an enfeebled state and not able to resist importunity which would not affect a man of ordinary firmness. Yet it is clear that a weak state of resistance may be taken into account in deciding whether his consent was coerced.[120] This is also the case where consent to marriage is in question.[121] Coercion seems to be the accepted term in the Divorce Court for a forced consent to marriage[122]; it is used in cases where the threats would have amounted to duress at common law.[123] Marital coercion is a familiar title in criminal law. In Admiralty there is a preference for the term compulsion.[124] The Admiralty principle was explained in *The Mark Lane* where a salvage agreement for an exorbitant amount was impeached as there were reasonable grounds for believing that the ship in distress would be abandoned unless the sum were agreed to. Butt, J., said[125]: "It is true

[120] *Wingrove* v. *Wingrove*, 11 P.D. 81, 82; *Hampson* v. *Guy*, 64 L.T. 778, 780, C.A.

[121] *Scott* v. *Sebright*, 12 P.D. 21, 31, Butt, J.: "She had been reduced by mental and bodily suffering to a state in which she was incapable of offering resistance to coercion or threats which in her normal condition she would have treated with the contempt she must have felt for the man who made use of them."

[122] *Scott* v. *Sebright*, 12 P.D. 21; *Cooper* v. *Crane*, [1891] p. 377, in which Collins, J., refers to "the doctrine of coercion," *Hussein* v. *Hussein*, [1938] p. 159.

[123] In *Cooper* v. *Crane* and *Hussein* v. *Hussein*, *supra*, there was a threat, among others, to kill the lady unless she consented.

[124] E.g. *The Helen & George*, Swab. 368, *The Medina*, 2 P.D. 5, where "pressure" was also used, *The Inna* (1938), p. 157.

[125] 15 P.D. 135, 137.

that there is not in this case the amount of duress which would invalidate an agreement at common law, but in this Court the same amount of compulsion or duress—call it what you will—is not necessary to induce the Court to refuse to enforce an agreement. . . . The fact is the master of *The Mark Lane* signed this agreement under compulsion, and, the amount being exorbitant, I decline to uphold the agreement." Such relief is comparable to the relief given by equity to persons in distressed circumstances where advantage is taken of their distress to obtain an agreement.[120] In equity such relief is usually allowed on the ground of "inequality" or "imposition." This is distinguishable from coercion or pressure because the party is in a state of distress or necessity which is exploited: the other party has not caused the distress or issued a threat.

As coercion is used in testamentary and matrimonial cases, pressure seems the preferable term to describe the *Williams* v. *Bayley* doctrine of equity and there is, as has been seen, more authority in its favour. On the other hand, "pressure" is found in bankruptcy law with a not dissimilar meaning. It is an old rule that a preference of one creditor by the debtor is not a fraudulent preference for the purpose of bankruptcy proceedings if it is made under pressure.[127] The question whether there has been a fraudulent preference depends not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. Bankruptcy legislation has not abolished the rule. As Lord Cairns said[128]: "The Act appears to me to have left the question of pressure as it appears under the old law; and, indeed, the word 'preference,' implying an act of free will, would, of itself, make it necessary to consider whether pressure had or had not been used." A threat of criminal proceedings amounts to pressure for this purpose[129] though actual threats are not necessary if the debtor acts in an endeavour to save himself from a prosecution. As Halsbury, L.C., said, in the latter event: "It becomes then no longer a voluntary act, but an act under pressure—pressure not the less because it is pressure upon his own mind and his own consciousness—from an apprehension of what will happen if bankruptcy takes place; not a pressure by threats of

[126] E.g. *Fry* v. *Lane*, 40 Ch.D. 312.

[127] E.g. "pressure" is used by Lord Kenyon in *Smith* v. *Payne*, 6 T.R. 152, Lord Campbell in *Edwards* v. *Glyn*, 2 E. & E. 29, 46 ("This payment by the bankrupt was not a voluntary payment, but was made under what, in the legal sense of the word, may be called pressure"), Parke, B., in *Brown* v. *Kempton*, 19 L.J. (N.S.) C.P. 169, 170 ("The payment was made under the influence of the pressure and importunity of the defendant").

[128] *Butcher* v. *Stead*, L.R. 7, H.L. 839, 846.

[129] There was formerly some doubt on this point; see a useful note on the doctrine of pressure by the reporter, *Bayley* v. *Williams*, 4 Giff. 638, 663.

creditors to assert their rights."[130] But apparently a threat to bring an action is not pressure,[131] though "an earnest request by a creditor, although not accompanied by a threat or remonstrance or very positive demand, may be enough to deprive the payment of that voluntary character which would tend to make it impeachable"[132] as an undue preference.[133] Pressure in bankruptcy must be distinguished from what is usually called extortion,[134] which is yet another term implying unwillingness. If a creditor by means of bankruptcy proceedings, actual or threatened, extorts or attempts to extort, from a debtor some profit over and above his original debt, the court may dismiss his petition. "A debt which has been used as a means of extortion cannot afterwards be made use of as a means of getting a receiving order."[135] But where the debtor proposed a contract which was more beneficial to the creditor than the dividend which he would have received in a bankruptcy, the court refused to treat it as a case of extortion.[136] Collins, L.J., said: "It is a question of policy, and the decided cases do not go so far as that; they go simply upon the question of extortion at common law; if the transaction is one of extortion it fails."[137] The rules of pressure and extortion in bankruptcy have a special function. They are not concerned with the absence of consent which avoids an ordinary transaction and are therefore not likely to be confused with the equitable doctrine of pressure.

In conclusion, it is submitted that undue influence has a clear meaning which is distinct from that of the multifarious words which imply absence of consent. Equity has fortunately avoided such terms as "constructive duress" and "equitable duress" and there is no reason why the term pressure should be replaced by that of undue influence. It is inaccurate to say[138] that the common law of duress has been superseded by undue influence: only when the latter term is used with reference to wills does it imply a consent that has been forced. When in a recent case it

[130] *Sharp* v. *Jackson*, [1899] A.C. 419, 426.
[131] *Per* Jessel, M.R., in *Ex p. Hall*, 19 Ch.D. 580, 585.
[132] *Per* Bacon, C.J.B., in *Ex p. Blackburn*, 12 Eq. 358, 363.
[133] *Ex p. Topham*, L.R. 8 Ch. App. 614.
[134] E.g. *Ex p. King*, 3 Ch.D. 461, C.A.; *Re Atkinson*, 9 Morrell 193; *Re Otway*, [1895] 1 Q.B. 812; *In re Shaw*, 83 L.T. 754.
[135] *Per* Rigby, L.J., in *In re Shaw*, 83 L.T. 754, 755.
[136] *Re Bebro*, [1900] 2 Q.B. 316, C.A.
[137] *Ibid.*, 324.
[138] Salmond & Winfield, *Law of Contracts*, 258, 259, quoted with approval by Porter, J., in *Mutual Finance Ltd.* v. *John Wetton & Sons Ltd.*, [1937] 2 K.B. 389, 394.

THE EVOLUTION OF THE MODERN ENGLISH PRISON SYSTEM

IN the period following the centralisation of and unification of the English prison system opinion regarding the aims of that system may be observed to have passed through three stages. During the first phase deterrence and retribution were held to be its proper objects. This phase can be said to coincide with the so-called Du Cane régime, i.e. the period when the prisons of Great Britain were under the administration of Sir Edmund du Cane (1878 to 1894). Du Cane admitted the need for combining penal and reformative elements but in practice the place reserved for the reformation of the prisoners was exceedingly small. The first attack on this principle was made by the Gladstone Report (*Report from the Departmental Committee on Prisons*, 1895) which was to play a vital rôle in the further development of the British prison system.[1]

The second phase was that when the prison system was administered by Sir Evelyn Ruggles Brise (1895 to 1922) and it was recognised that apart from the function of deterrence and retribution the prisons should also exercise a reformatory influence. This reformative function was accepted as an important and essential feature of the prison system, but it was accepted as a distinctly secondary function.[2]

It is most noteworthy for the evolution which has taken place in this domain that the views presented by the above-mentioned Report in 1912–13 as those of "loose thinkers and loose writers"

[1] ". . . prison treatment should have as its primary and concurrent objects deterrence and reformation" and should be "effectually designed to maintain, stimulate or awaken the higher susceptibilities of prisoners . . . and whenever possible to turn them out of prison better men and women, both physically and morally, than when they came in." Report from the Departmental Committee on Prisons, 1895, para. 47, p. 18, and para. 25, p. 8.

[2] This point of view was very clearly expressed by the Annual Report of the Prison Commissioners for England and Wales (1912–1913). This Report states that if the aim of the prison system is to be retributory, deterrent and reformatory none the less, "the important thing is as to the order of precedence of the three attributes," and in this connection, the Report defines the issue more closely as follows: "If by 'retributory' is meant, not the vulgar and exploded instinct of vengeance or personal revenge, but the determination of the human consciousness that the system of rights shall be maintained and that he who offends against it shall be punished, and that the punishment shall be of such a nature as to deter him and others from anti-social acts; if by 'reformatory' is meant the accepted axiom of modern penology that a prisoner has reversionary rights of humanity and that these must be respected consistently with the due execution of the law, and that no effort must be spared to restore that man to society as a better and a wiser man and a good citizen—any inversion of these factors of punishment would be fatal; but among loose thinkers and loose writers the impression seems to be gaining ground that this historic order of the factors of punishment should be inverted, and that the object of punishment shall be altogether reformatory, as little as possible deterrent, and not at all retributory." Pp. 22–23.

are at present the dominant ones in England and what is more, shared by the persons responsible for the conduct of the prison system of that country. In the third and present phase, initiated after the War, the object of the prison system is based on the utilitarian and reformatory ideas. According to the concept dominant at present the sanction of privation of liberty should be carried out in such wise that as few prisoners as possible return to the prisons, and the method employed for the attainment of this object is to submit the delinquents to such action as may educate and prepare them for re-entry into social life (with the exception of course of those who are not susceptible to such re-education). The principle of deterrence and retribution is satisfied in the very fact of the apprehension of the offenders, the administration of a suitable punishment, and the depriving them of their liberty. A prison system based on the system of reformation of prisoners not only does not weaken discipline in the penitentiary and does not make their stay there a pleasant one, but presents to the prisoner a number of tasks which require an intensive effort on the part of the offender, one, too, which he makes only with the utmost difficulty.[3]

With this in view many and very diverse reforms are being effected in that country in the fields of prison administration, prison discipline and so on. Present-day English penitentiary

[3] The above dominant views on the objects of the prison system now current in England are brought out in high relief by the following passages culled from the Annual Reports of the Prison Commissioners for 1923 and for 1925.

"Since the offender has to return to ordinary life, take his place as a citizen, and earn his living at some time in the future, which is usually not far distant, our object is to fit him for those duties. The means to this end are fairly long hours of hard and steady work at an occupation which shall, if possible, give such industrial training as will enable him to earn a living; the removal of needless degradations and the encouragement of self-respect, and in the evenings, well considered education suitable for backward or unbalanced adults. To these are added visiting by voluntary workers of a strong character and personal influence, and, whenever possible, such measures of trust as will awaken a sense of personal responsibility. The prison day should be hard, but the object is not mere severity. It should be interesting, but the object is not to make it pleasant. The aim is to make a citizen by quickening and directing the activities of both mind and body." (*Annual Report*, 1923, p. 16.)

"Prisons exist to protect Society, and they can only give efficient protection in one of two ways, either (*a*) by removing the anti-social person from the community altogether, or for a very long period; or (*b*) by bringing about some change in him. Any general application of the first method would not be supported by public opinion. The prison administration must therefore do its utmost to apply the second, that is to say, to restore the man who has been imprisoned to ordinary standards of citizenship so far as this can be done within the limits of his sentence. Unless some use can be made of the period of imprisonment to change the anti-social outlook of the offender and to bring him into a more healthy frame of mind towards his fellow citizens, he will, on leaving the prison gates after a few weeks or months again become a danger or at any rate a nuisance. He may, indeed, be worse than before, if the only result has been to add a vindictive desire for revenge on society to the selfish carelessness of the rights of others which he brought into prison with him." (*Annual Report*, 1925, p. 17–18.)

policy is marked by clear ideological traits: everything that is done is directed towards a single end, and this is true not only of larger scale changes but also of everyday matters.

Understood thus prison reform appears to be the most difficult task lying within the sphere of penitentiary policy. The introduction of appropriate regulations has only secondary significance. The fundamental question is the elaboration and carrying into effect of such a system of treatment as may be efficacious in reforming the delinquents. Viewed in this light, the rôle of the prison system is seen not to be a mere matter of assuring that sentences are carried out; the sentence itself is only justified in so far as it forms a basis for reformative treatment. The problem of prison reform is shifted from the administrative field to the criminological and social one.

Because on the one hand prison reform in England is decidedly heading for such transformation of the system as would provide the best possible conditions for reformative action on the prisoners, while on the other really serious difficulties constantly occur in the practice of reformative action, the question arises as to what are the actual, concrete possibilities of the proposed reforms being carried out.

It seems to us, that in spite of all, there are real possibilities that the measures of penitentiary reform undertaken in England, may be successfully carried into effect. We shall list below factors which in England largely nullify the difficulties that block the path of every broadly conceived reform of the prison system aiming at the development of reformative influence on the prisoners; these factors indicate too that such reform in England has considerable chances of success.

(*a*) Public opinion in England is more and more interested in prison reform and increasingly appreciates the social and national significance of the problem. An interesting illustration of the change in the attitude of the public with regard to this matter is afforded by debates and discussions in Parliament and in the Press in recent years.

(*b*) English penal legislation also facilitates the realisation of penitentiary reform and removes a number of potent difficulties from its path. On the one hand, this legislation has adopted quite a number of indeterminate (relatively) sentences which, in the case of a certain category of delinquents, make it possible to apply reformative action for a longer period to them; on the other hand, the existing legislation has been supplemented by a number of sanctions supplanting short

term prison sentences (which as already stated are valueless from the point of view of reformative action).

(*c*) The work of penitentiary reform is facilitated not only by the penal legislation of the country, but also by the courts of justice, viz. by the manner in which they apply the methods of penal repression. We have shown (when studying the evolution of the system of sanctions) that the courts more and more often supplant short term sentences by the imposition of fines or by delivering sentences of probation sanctions (although *Criminal Statistics* has pointed out in several of its annual introductions as do also the Prison Reports for the last few years, that the courts still do not make full use of their powers in this respect).

(*d*) Another circumstance favouring the carrying out of prison reform is the present state and trend of criminality. The general increase in criminality during the last few years has undoubtedly been the result of an increase in the number of offences committed by youthful delinquents; an analysis of present-day criminality indicates that the more serious crimes are tending to decrease in number and that cases of serious professional criminality are relatively few. Both these features are characteristic of present-day criminality in England and both undoubtedly facilitate the carrying out of the reforms envisaged.

(*e*) The possibility of carrying out in England reforms of the kind indicated above depends largely on the number of prisoners. It should be borne in mind that reformative action is so costly and requires such a numerous and carefully selected personnel, penal establishments of such a high level of architectural excellence, so strict a classification of prisoners, and such individual treatment of them, that it is virtually impossible in overcrowded prisons. The average number of persons held in the prisons of England was in 1936 10,613. The figure is steadily decreasing (it had been 11,306 in 1935). Furthermore, it should be noted that these figures include prisoners held pending trial and civil process prisoners.

(*f*) Undoubtedly another positive factor is the very small number of persons held pending trial and the relatively small number of political prisoners. These two categories (obviously they are quite different in type) introduce many problems very difficult of solution in the field of penitentiary policy, particularly in those countries where such prisoners constitute a considerable proportion of the prison population.

(*g*) Under the English prison system, prisoners are housed in separate cells; the housing of several prisoners in a single cell is a very serious obstacle to proper reformative action.

(*h*) The English prisons operate a different system for a certain group of offenders, i.e. those aged 17 to 23 and sentenced by the courts to Borstal detention; the Borstal system undoubtedly contributes greatly to penitentiary reform with respect to other groups of offenders, since it constitutes a kind of "school," and involves the investigation of all the basic problems (mode of examining the personality of the prisoner, his classification, the segregation to be effected in the penal establishments, methods of influencing the prisoners and the organisation of post-prison welfare work). Penitentiary reform in general can profit by the experience gained by the working of the Borstal system, naturally taking into consideration all the differences existing between a prison system for adults and the Borstal system.

(*i*) Another feature favouring the introduction of penitentiary reform in England along the lines indicated is the fact that the prison system there has been developing constantly and along evolutionary lines; none of the reforms were effected in a sudden radical fashion which might have weakened the efficiency of the prison administration or demoralized the prison population.

(*j*) And last but not least the fact that the English prison system has been centralised has also undoubtedly facilitated prison reform, since this centralisation renders it possible to pursue a uniform penitentiary policy throughout the country. (But it must be pointed out that for a long time this centralisation was a hindrance to prison reform because every attempt to introduce a more rational classification of prisoners and prisons was regarded as having a weakening effect upon it.)

It may therefore be stated that although the transformation of the prison system in a spirit of the reformative execution of sanctions is on the whole an extremely difficult task (as in every prison system), there are in England quite a number of potent circumstances which largely facilitate the execution of such a penitentiary reform.

The transformation of the prison system in England is conceived very radically.

(*a*) First of all, the reformation of the offenders has been taken to be the principal object of imprisonment. The official

statement of this view constitutes an undoubted turning point in the evolution of English penal and penitentiary policies.

(*b*) The method of classifying prisoners solely according to penal criteria or administrative considerations is being more and more rapidly abandoned, and is being supplanted by the method of classification whereby the degree of danger to society presented by the prisoners and the possibility of reforming them is taken into consideration.

(*c*) In connection with this new approach to the problem of classifying prisoners, a tendency appears to abandon the differentiation of the prisoners from the standpoint solely of penal and administrative criteria, and to supplant this by a classification which takes into account the particular category of prisoners placed in a given penal establishment and the type of reformative action which the given establishment is to effect.

(*d*) The cellular system is being abandoned more and more as a means of carrying out the sanction of imprisonment and the cells are more and more used solely as quarters for the night, and during the hours free from collective work in the day.

(*e*) Undoubtedly, too, the attitude of the prison administration to the prisoners has become more humanitarian and imbued with a greater realization of the need for extending individual treatment to them.

(*f*) Some change has also taken place in views on prison discipline and on the role of disciplinary punishments. The concept of discipline has ceased to be solely an administrative formal one and disciplinary punishment solely a means of intimidation.

(*g*) Changes have also taken place in views on the rôle of work in prisons, which is becoming less and less a form of punishment and a hardship inflicted on prisoners and more and more a means of reformation, one which will, in addition, make it easier for the prisoner to find suitable employment after serving his term.

(*h*) In order to maintain contact with prisoners, as also to interest public opinion in the problems of penitentiary life, a special social service has been organised which remains in constant contact with such ex-prisoners and which, according to the statements of the prison administration itself, has become

a factor of prime importance in the task of reforming the prisoners.

(*i*) Great stress is laid on the training of the prison personnel and efforts are made to build up a fully qualified penitentiary staff.

(*j*) The Borstal system has been extended and greatly improved. The rôle of this system, in view of the category of offenders for whom it is destined, is a very important one; the introduction of the Borstal principles into other kinds of penal establishments is of no less a significance.

(*k*) The organisation of post-prison welfare work and supervision has been greatly extended and improved. In the Borstal field, this problem can be said to have been virtually solved whilst in that of convict and of local prisons steady progress is visible.

(1) Penal establishments which are particularly unsuitable for the application of reformative methods are being liquidated. At the same time, a prison building plan has been drawn up, the object of which is to construct a system of new establishments in which such action will be developed fully.

The English prison system not only yields nothing in comparison with the most modern systems in other countries, but even in many respects surpasses them. England's penal policy in the field of penitentiary practice has, particularly during the last few years, been a very bold, consistent and experimental one; it is being ever better understood in that country that the prison system is not only one of the divisions of the administration of the State but that it is also a kind of specific social service in combating criminality.

Yet, in spite of all that has been done, the work of prison reform in England can by no means be considered as finished. In spite of the transformations effected, there is still a very wide gap between the ultimate aims of the prison administration and the actual state of affairs in the prisons.

There can be no doubt that one of the best indications of the level of a given prison system is the type and scope of the classification of prisoners effected within that system. The more primitive the structure of the given prison system, the more simplified is the system of classification of prisoners which it applies.

The advances so far made in the classification of prisoners in the English penitentiary system can be characterised as follows—

(*a*) the system of classification now applied is not effected

from the administrative point of view but from that of the criminological one and primarily takes into consideration the danger to society presented by the given groups of prisoners and the possibility of their reform;

(*b*) in view of this approach to the problem of classifying prisoners, binding rules have not exhaustively regulated this matter, the prison administration being permitted to effect such further classification as it sees fit; whilst Rule 68 (1) of the Prison Rules of August 12, 1933, envisages a general scheme of general classification, Rule 68 (2) envisages the possibility of introducing new forms of classification ("The Commissioners may set up such other classes as may in their opinion be necessary for improving the methods of classification; and they may in their discretion authorise in particular cases or at particular prisons such departures . . ."); this passage is characteristic for the peculiarly empiric approach followed with regard to the problem of the classification of prisoners;

(*c*) the classification now being effected is more and more often effected without regard to the legal classification introduced by legislation; not so long ago, there were two separate services in the English penitentiary system: the penal servitude service and the imprisonment service; at present, in many cases, a prisoner sentenced to one of these forms of punishment is subjected to the other; this is characteristic of the existing tendency to differentiate punishment not according to the gravity of the offence committed but according to certain specific characteristics of the offenders;

(*d*) The classification now in course of realisation is introduced with due consideration of the whole prison population of the country; this embraces not only men and women, but also the aged and the young, first offenders and recidivists, prisoners already sentenced and prisoners remanded or pending trial; in this tendency of effecting a general and very detailed classification, the most characteristic is probably the difference made between prisoners on remand or pending trial: the prison administration has not contented itself with separating such prisoners from these already sentenced, but on the territory of the L.M.A. this group has been classified still further, i.e. Brixton prison, where they are concentrated, prisoners on remand or awaiting trial are divided, those who have never been sentenced before being placed in one wing and those who have been previously sentenced in another. This exceedingly

important differentiation has as its object to protect those prisoners who have never been convicted before against demoralisation.

(*e*) This classification is not only conducted from the negative standpoint (i.e.) to single out a certain group of prisoners in order to reduce or remove the danger of demoralisation) but also from the positive standpoint, i.e. with the idea of creating the most appropriate conditions for exerting some reformative influence; this is clearly stated in Rule 68 (1) of the Prison Rules mentioned above: "with a view to facilitating the training of convicted prisoners and to minimising the danger of contamination, the governor shall classify them . . ."; this positive function of classification has even been accepted as the chief and most essential one.

(*f*) The classification now effected primarily considers the age and status of the prisoner's criminality record. The intention of the English penitentiary policy is to apply reformative action primarily with regard to younger prisoners and to those whose criminal activity has not acquired a permanent and chronic character. It must be stated, however, that this group not only includes youthful offenders but also the rather older ones, the young adult offenders (even to the age of 35), as also to recidivist prisoners (in the last case, naturally, to those whose criminal record is still relatively short).

(*g*) The classification of prisoners is connected with an appropriate differentiation of penal establishments, which consists in the allocation of certain of these exclusively for certain singled-out categories of prisoners. Such differentiation of prisons has as its object the making it possible to subject the given group of prisoners to the most intensive reformative action. The classification of the prisoners leads to the specialisation of the penal establishments housing them. The establishments at Maidstone, Wakefield, Wakefield New Hall Camp, and Chelmsford are already really special institutions destined for strictly specialised groups of prisoners and prepared for certain specific modes of reformative action.

However, in spite of the fact that the above-mentioned acts are of great significance, the rational classification of prisoners in the English penitentiary system has not yet been carried out. It appears that in this connection, the following observations can be made—

(*a*) A general and exhaustive classification of the prisoners

has not yet been effected in the English system, and there are many prisoners who have not been classified at all, whilst other groups have been only partially classified.

Many of the offenders aged 17 to 23 are still being housed in prisons; very little has been done to single out these delinquents and to subject the young adults, first offenders and less serious recidivists to special reformative action.

(*b*) Experience indicates that in penal establishments not destined for certain defined categories of prisoners but for a number of various and diverse categories, the classification of prisoners does not yield satisfactory results. In such establishments the classification does not carry out its negative function with absolute precision (consisting in isolating the various groups from each other) and hence is all the further from carrying out its positive function (which consists in making it possible to effect suitable types of reformative action selected in view of the groups singled out). Everything points to the fact that several systems of reformative action cannot be conducted in one and the same establishment, without leading either to the supremacy of one or the incomplete application of all. There can be no doubt that the positive classification of prisoners requires specialisation of penal establishments, and there are only a few special establishments of this kind in England.

(*c*) The experience so far amassed also indicates that a general and exhaustive really modern system of classifying the prisoners connected with far reaching specialisation of penal establishments, demands the construction of a number of new prison buildings destined for a relatively small number of prisoners (350 inmates at the most). The complete realisation of the classification of prisoners is an extremely difficult task, and it is even quite impossible in buildings dating from another epoch, not only from another architectural epoch but also from another penitentiary one.

Apart from the general classification of prisoners, a classification according to mental conditions must also be effected in every rational prison system.

The necessity of taking the mental factor into account when examining the personality of prisoners with a view to establishing the action of penitentiary treatment upon them, has been fully accepted by modern criminological science. Undoubtedly, the results of research so far made into the genesis of psychical diseases, their classification and their rôle in the etiology of

criminality, no less than the methods of cure applied to date, are very often insufficient, fragmentary and lacking in the requisite precision. None the less, it is impossible to imagine a really modern penitentiary establishment in which the psychical factor with respect to the personality of the prisoners would not be taken into account, and in which the need for effecting a classification with due regard to psychical structure would not be recognised. There can be no doubt that the percentage of individuals more or less mentally defective must be very large amongst the inmates of prisons. Even if it is not always possible to accept this mental deficiency as the cause of the criminality, none the less, rational reformative action cannot shut its eyes to this factor. The conduct of a prisoner, his adaptation to prison conditions, his relations with the personnel, his participation in the reformative action of which he is the object, his susceptibility to reformative influences, the manner in which he conducts himself after serving his term, all these may in great measure depend on whether the delinquent is mentally deficient, psychically deranged or congenitally affected.

In connection with this problem, the rôle of the prison physician is changed fundamentally. Under the present-day conditions in prisons, the functions of the physician are not restricted to questions of the physical health of the prisoners and of the hygienic state of the establishment; he must also collaborate with the prison administration in elaborating and carrying out systems of classification of the prisoners, and in influencing the prisoners, primarily those who have been recognised as being psychically disordered. In this connection, it must be remarked that the concept of psychic disorder accepted by the binding English legislation is inadequate for application within the prisons.

Note must be made that: (*a*) in accordance with the regulations in force, the prison physician is expected to fulfil this new rôle in prison practice, and (*b*) the British penitentiary medical service understands the necessity for conducting a universal, psychiatrical classification of the prisoners.

Re (*a*): paras. 105, 106, 107, 108, and 109 of the binding Prison Rules (issued 12th August, 1933) refer to the medical officers; they determine and fix the scope of action of the prison physician as that of a factor bound to watch over the hygienic conditions of the establishment and over the health of the prisoners; paras. 61, 62, 63, and 107 (4) fix the functions of the medical officer in connection with the application and execution of disciplinary punishments, whilst para. 65 deals with the application of restraints. But on the other hand, paras. 110 (1), and 111 (1), (2)

allocate such functions to the prison medical officer and give him such rights that his activities are shifted from the domain of exclusively medical activities to that of the medical penitentiary field. These regulations undoubtedly give the medical officer in prisons some basis for closer collaboration with the prison administration with respect to the classification of prisoners and the treatment applied.

Re (*b*): another extremely important fact is, as already stated, that the English prison medical service has recognised the need for effecting very comprehensive and thorough psychiatrical classification of the prisoners. A most important document in this connection is the classification elaborated by Dr. W. Norwood East (Commissioner of the Prison Commission and director of the prison medical service). He inserted it in the *Report of the Commissioners and of the Directors of Convict Prisons for the Year* 1935 (published in 1937, see "Report of the Medical Commissioner," pp. 55, 56) and provided the following commentary: "A glance at the accompanying classification of the mental conditions of criminals as seen in English prisons should establish the complexity of the Medical Officer's task."

There is no lack of evidence indicating that under the present English prison system, efforts are being made to put the above postulates into effect.

(*a*) Prison medical officers conduct examinations of unconvicted prisoners (on remand or awaiting trial) upon instructions from the courts.

(*b*) Examinations are effected as to the personality of all the offenders aged 17 to 23 and sentenced to Borstal sanction: in these examinations, the factors of psychical health, congenital disorders, etc., are investigated.

(*c*) A special psychiatrist has been appointed to Wormwood Scrubs in order to examine and cure certain cases.

(*d*) Many prison medical officers make studies of various problems interesting them, and publish their findings at annual conferences of prison physicians.

(*e*) Prisoners are being constantly transferred from prisons to lunatic asylums or to institutions for mental defectives in accordance with the stipulations of the respective laws, which foresee the possibility of mental disorders developing in prisoners during their term of sentence and permit the prison administration to transfer them in this case to appropriate institutions.

(*f*) Such cases as do not fall within the relatively narrow

limits of the law respecting mental defectives (so called "non-certifiable cases") are directed to special divisions of certain penal establishments.

In spite of the fact that the above changes are most important and yield valuable results, it cannot be stated that psychiatrical classification has been fully developed in the English prison system. Dr. East rightly warns us against an over simplified approach to the subject, and reminds us of the errors made in the era of phrenological and of anthropological criminal examinations. None the less, the findings of Continental and American science indicate that much may already be done in the field of the psychiatrical classification of prisoners in spite of the essential caution which has still to be exercised.

The carrying out of such a reform is contingent on the satisfaction of the following conditions: (*a*) There must be engaged a medical personnel which is sufficiently large and has adequate criminological-psychiatrical training and knowledge and it must devote itself solely to work in penitentiaries; (*b*) special bio-criminal laboratories should be established in the prisons to serve as centres for this work; (*c*) exhaustive examinations of the personality of prisoners should be conducted in the prisons and should then form the basis for a proper classification (Goring's work, which constitutes an item of lasting worth in criminological literature, chiefly had as its object the examination of the query whether there is a separate anthropological type of the criminal, and to-day fails to answer a number of questions advanced by modern criminal biology); (*d*) the percentage of prisoners who are not fully sane and in possession of all their mental faculties should be determined exactly; prisoners who have been eliminated under present conditions, constitute only an insignificant part of this category; (*e*) a certain category of mental defectives should be housed in penal establishments specially set up for this purpose and designed to exert a curative and reformative influence; obviously not all the prisoners recognised as psychically deranged need necessarily be eliminated from normal prisons but there can be no doubt that some of them require a separate system; (*f*) in cases of mental defectives discharged from prison closer collaboration should be introduced between the after care organization and the different institutions which (practically or theoretically) occupy themselves with mental defectives.

It would appear that the solution of the problem of mentally defective prisoners depends primarily on the solution of the above-mentioned questions.

This divergence between the purpose aimed at and the results

so far achieved still undoubtedly exists in a great measure in both the general and psychiatrical classification of prisoners; it can be noted also in a number of other divisions in the modern English penitentiary system.

It can be stated that the Borstal system has really and actually been reformed; it is now an organically conceived system for the reformation of prisoners. Within the limits of that system, methodical examinations of the personality of prisoners have been organised, and a precise classification has been drawn up; in addition, a network of establishments appropriate to this classification has been built up, extra-mural supervision has been organised in close connection and contact with the reformative technique in use within the Borstal institutions. Undoubtedly some further improvements in the system obviously suggest themselves. It would, for instance, be advisable to construct more modern buildings, to modernise the system of work, to break with the old type of Borstal institution in a more decisive way, and to adopt more widely such a type of establishment as that at Lowdham Grange or the North Sea Camp; it would likewise be advisable to organise an institution which would make a more thoroughgoing investigation of cases of offences committed by former Borstal inmates, and so on. Undoubtedly, too, quite a number of improvements and innovations could be introduced into the Borstal system, but the possibility and even the necessity for such changes in no way affects the fact that in this field of British penitentiary policy a reform has been realised in the fullest sense of the term. Naturally the scope of the reform is restricted in so far as the Borstal system does not apply to all offenders aged 17 to 23 who should be subjected to its reformative action but only to a relatively small part of this element, in accordance with the binding legislation.

"Penitentiary reform" implies, after all, not an aggregate of certain individual innovations, however significant and vital, effected in the domain of the prison system, but rather the basic and radical reconstruction of that system. A reform, conceived along these lines, has not yet been carried out with regard to the adult prisoners, although, as already stated, quite a number of extremely important innovations have been introduced, many interesting experiments made, and the track blazed for the future progress which is to be made in this direction. The conducting of reforms in the prison system for adults really means the introduction of Borstal principles into the system: examinations of the personality of the prisoners, an appropriate classification and segregation in suitable establishments on the basis of such

classification, subjecting the prisoners to the intensive action of a specialised personnel, and proper supervision over them by a special organisation when they leave the prison walls.

Undoubtedly, between such a prison system for adults and the Borstal system there must be differences, which will primarily consist in the selection of modes of acting on the inmates with a due regard to their susceptibility to reformative action. But these differences need not possess fundamental significance, and such selection exists in some measure within the Borstal system itself.

There are elements in the Borstal system which must constitute the basic ideas of every type of penitentiary reform. If the reforms now being introduced in England with respect to the prison system for adults attain full realisation, this will be tantamount in practice to the application of the basic Borstal elements and principles to this category of prisoners.

LEON RADZINOWICZ.

THE REPORT OF THE TRANSPORT ADVISORY COUNCIL ON THE SQUARE DEAL DISPUTE

The law governing railway rates has been much in the public eye of late. The economic and social significance of this branch of the law need hardly be emphasised. The railway companies desire to obtain a larger measure of freedom of contract with regard to the amount of their rates, and the bulk of the existing statutory provisions is to be repealed. This contemplated revolutionary change in the English law of inland transport raises the general issue of the law's attitude towards competition and monopoly. The way in which a solution of the problem is now attempted confronts the lawyer with new aspects of the method of legislation. The recent Report of the Transport Advisory Council (T.A.C.) therefore deserves the closest attention of those who are interested in the general trend of the process of legislation.[1]

I

It is necessary to say something about the existing law in order to be able to deal with the changes proposed by the Report. The existence of railways confronted the legislator with a threefold task: The protection of the public against possible encroachments on the part of a monopolist, the protection of the railways themselves as institutions of public importance, and, finally, the protection of those rival transport undertakings which had been able to survive the advent of the railways in the modern industrial community.

Most of the statute law referring to railways which has been enacted since the 'forties and 'fifties of the last century can be understood as an attempt to protect the trading community from harm which might be done by a monopolist. In the early days[2] the private Acts by which railway companies were created and endowed with compulsory powers imposed upon the railway companies statutory maxima of rates in order to prevent them from exploiting consignors and consignees at their pleasure. Within those maxima the railway companies were free to demand whatever charges they liked, provided they did not infringe the rules against inequality of charges and undue preference about which something will have to be said below. This system of statutory maxima remained in force until the outbreak of the Great War, although in practice legislation passed in the early 'nineties made it wellnigh impossible for the railway companies

[1] Transport Advisory Council. *Report on the Proposals of the Main Line Railway Companies as to the Conveyance of Merchandise by Rail.* London, H.M. Stationery Office, 1939. 1s. 6d. 95 pp.

The T.A.C. was created by s. 46 of the Road and Rail Traffic Act, 1933, "for the purpose of giving advice and assistance to the Minister of Transport in connexion with the discharge by him of his functions in relation to means of, and facilities for, transport, and their co-ordination, improvement, and development." The members are appointed by the Minister of Transport and include representatives of local authorities in England, Wales, and Scotland, of users of mechanically propelled vehicles and horses and horse-drawn vehicles, of pedestrians and pedal cyclists, of railways, canals, coastwise shipping, harbours and docks, of labour, and of trading interests including agriculture. The T.A.C. is thus, in effect, a kind of Transport Parliament.

[2] See Leslie, *The Law of Transport by Railway*, Second Edition, p. 315.

to make full use of the power to raise their charges *ad libitum*.[3] The system of maximum charges was, however, abandoned when an entirely new system of railway law came into force with the Railways Act, 1921. The maxima were replaced by so-called standard charges, i.e. rates fixed by a judicial body, the Railway Rates Tribunal, which were subject to annual revision, and were to be regarded as fixed charges which could in no case be raised by the railway companies themselves and which could be reduced only in a way prescribed by statute.[3a] The Railways Act, 1921, can only be understood, if it is realized that the legislator regarded the railways still as monopolists. The theory that the price for the services performed by the railways could be fixed beforehand and was to be unalterable, at least in principle, arose from the conception that the question of supply and demand and the necessity to meet competition would not, as a rule, enter into the matter. The technical and commercial development of the post-War years belied this forecast, with the result that for most of the traffic the standard rates operated in fact as maxima within which the companies made use of their statutory right to grant "exceptional" rates to traders.[4] It may thus be said that the attempt to convert the pre-War system of statutory maxima into a post-War system of statutory fixed rates has failed, at least to a very large extent, and that in fact, though not in law, the legal system of railway charges now in force has much more in common with the system of the Railway and Canal Traffic Act, 1888, than may appear at first sight.

There is, however, in law and in fact, one very important difference between the pre-War system of maxima and the present one. In the nineteenth century, at least until the restrictive legislation of the early 'nineties came into force, the railways were free to move within their maxima upwards and downwards as they pleased. This is not so under the Railways Act, 1921, and it is here that we meet with one of the big grievances to which the square deal agitation gives expression. In order to charge for carriage of goods less than the standard rate, the railway companies have to grant what is known as an exceptional rate. This is not a rate based on a contract between a given railway company and a given trader for a given consignment or group of consignments, but a "miniature standard rate,"[4a] i.e. a rate lower than the standard

[3] The system of maximum rates was modernised and simplified by the Railway and Canal Traffic Act, 1888, s. 24, and the various Rates and Charges Order Confirmation Acts, 1891 and 1892. But it was intended to remain a system of *maximum* rates. However, on the 1st of January, 1893, most rates were raised by the companies to the maximum. In order to check this action on the part of the companies, Parliament passed the Railway and Canal Traffic Act, 1894, which provided that an increase of rates even *within the maximum* was to be valid only if the Company could prove that the increase was reasonable. This enactment was retrospective and took effect as from the end of the year 1892. It operated so as to convert all existing rates into what were in fact fixed rates and to make the maxima meaningless.

[3a] Railways Act, 1921, s. 32. [4] Railways Act, 1921, s. 37.

[4a] A standard station to station rate consists of three parts: the rate for conveyance, the station terminal (being the remuneration for the use of stations and for clerical work, etc.), and the service terminals, being the remuneration for services like loading, covering, etc. See s. 30 and Schedules IV and V. An exceptional rate, being a "standard rate *en miniature*" is capable of being "disintegrated," i.e. it is deemed to be "built up" of constituent parts proportionate to those of the standard charge out of which it is "carved." The railway company must show, on request, which part of the exceptional rate represents the consideration for the conveyance itself, which is the equivalent of services at the stations, etc. S. 40.

applicable to a class of goods travelling over a defined route. It is, therefore, available to every trader who sends these goods over this particular route. The power to grant exceptional rates does not mean that the railways enjoy freedom of contract within the standard. It only means that, if they follow the procedure prescribed by law,[5] they may replace the prescribed standard charge by a lower, but equally statutory charge. When granting an exceptional rate, the company does not act as a contracting party, but as an organ within the legislative process. Every granted exceptional rate has to be reported to the Minister of Transport[6] who may refer it to the R.R.T. for revision, cancellation or modification.[6a] The railway companies are not at liberty to grant exceptional rates lower than forty per cent below standard without obtaining the consent of the R.R.T.[6b] The R.R.T. may also fix exceptional rates upon application by a trader or association of traders.[6c] Finally, the cancellation, increase and reduction of exceptional rates are subject to certain statutory restrictions.[7]

The rigidity of these rules was somewhat mitigated by the Road and Rail Traffic Act, 1933.[8] By that time it had become obvious that a more effective way of coping with road competition would have to be opened to the railway companies, and the Salter Report[9] was made with this object in view. The law of 1933 introduced a third type of charge, the agreed charge, which, in contradistinction to the exceptional rate is of a contractual character. An agreed charge is a rate made by contract between a railway company and a trader. It need not, and does not as a rule, bear any relation to the system of standard charges contained in the Railways Act. It is not necessarily connected with the ton-mile calculation which underlies every standard and every exceptional rate, and it is only available to the individual trader who has made the contract with the railway company. Thus, the Act of 1933 made a first step towards adapting the railway companies' legal position to their new situation as competitors with carriers by road, but it failed to satisfy the desires of the railway companies. The agreement is subject to the approval of the R.R.T., and the consent of the R.R.T. is only given after a public hearing at which rival traders may raise objections. Moreover, a rival trader who feels aggrieved by the agreed charge granted to his competitor may obtain an "imposed agreed" charge from the R.R.T., even though the railway company over the system of which he consigns his goods, is not the one which granted the agreed charge. Evidently, though dealing with the railway companies as suppliers of services in a competitive market, the Act makes every possible effort to prevent the railway companies from abusing their new privileges where they still happen to be monopolists. The railway companies object to the necessity of obtaining the R.R.T.'s approval for every agreed charge, and they resent the publicity which is thus forced upon them in connection with these contracts.

There is always a danger lest a monopolist should arbitrarily interfere with the conditions under which his own customers compete. From the

[5] S. 37.
[6] S. 37 (1).
[6a] S. 37 (2).
[6b] S. 37 (1), as amended by s. 40 of the Road and Rail Traffic Act, 1933.
[6c] S. 37 (3).
[7] S. 38.
[8] S. 37.
[9] *Report of the Conference on Rail and Road Transport*, 1932.

earliest days of railways the legislature has regarded it as its task to protect the trading community from inequality of railway charges and from undue preference by the company of one trader in comparison with another.[10] The provisions prohibiting inequality and undue preference have given rise to a formidable body of case law, but, since the 1921 Act came into force, those cases have been few and far between. It seems that the real importance of the provisions against undue preference had spent itself with the coming into force of the new system of exceptional rates briefly described above, for there was little opportunity for preference now that an exceptional rate could no longer be granted to an individual trader and that producers of, or traders in, a class of goods competing with a class favoured by an exceptional rate were in a position to ask the R.R.T. to fix a similar exceptional rate for their own benefit.[11] The system of agreed charges under the 1933 Act might have revived the law of undue preference, had it not been for the clause in the Act which made it impossible to complain of an approved agreed charge as an inequality or undue preference.[11a] It will thus be readily seen, that from the point of view of the existing law there would not seem to be much substance in the railway companies' complaint that they are hampered by provisions enacted almost a century ago. Moreover, if one looks at the case law developed under the clauses of the Acts of 1845, 1854, and 1888, one cannot fail to perceive that the Courts have been willing to lend an ear to the railway companies whenever there was any justification for a discrimination of one trader or group of traders in comparison with another. Not only higher costs of the service performed,[11b] compensating advantages given to the company by a preferred trader, and the like, but even the fact that it was necessary to ward off existing competition on one line, but not on another, have been held to be justifications for a preference.[12] Yet, it is not difficult to understand why the companies attach so much importance to the repeal of the law of undue preference. Though of perhaps comparatively little practical importance now, this part of railway law would at once regain all its former significance if the railway companies' other demands, particularly those for the repeal of the system of standard, exceptional and agreed charges were granted. The outcry against the law of undue preference is directed not so much against what this part of the law does now, but against what it would do, if the "square deal" campaign succeeded in other respects. For this reason the repeal of the relevant provisions of the Acts of 1845, 1854, and 1888 is the necessary corollary to the reform of the general charging system.

There is no need for the law to force a competitor in a market to give any publicity to the prices which he means to demand for his goods or services. It will be his own interest to make them known to the community as a whole. In the case of a monopolist however, the law must ensure that

[10] Railways Clauses Consolidation Act, 1845, s. 90. Railway and Canal Traffic Act, 1854, s. 20. Railway and Canal Traffic Act, 1888, s. 27.

[11] *James Dole and Co.* v. *The Four Amalgamated Railway Cos. and the L.P.T.B.* (1937), 25 Traffic Cases 87.

[11a] Sect. 37 (9). About the eclipse of the law of undue preference see Kahn-Freund, *Law of Carriage by Inland Transport*, p. 404.

[11b] *Town Commissioners of Newry* v. *G.N.Ry.Co. of Ireland* (1891), 7 R. and C.T.C. 184.

[12] See the cases summarised in Kahn-Freund, *loc. cit.*, at p. 400. See in particular the dictum of Scrutton, L.J., in *Association of Master Lightermen and Barge Owners* v. *S.Ry. Co.* (1933), 21 R. and C.T.C. 126, at pp. 151–152, and that of MacKinnon, J., at p. 138.

prospective customers have ample opportunity of finding out beforehand the prices which they are expected to pay. Moreover, publicity of charges is, in the case of railway companies, one of the means of enforcing obedience to the legislation with regard to statutory rates and undue preference. Ever since 1873[13] the railway companies have been subject to the utmost publicity of all their rates. They have to keep a rate book open for inspection by the public at every station. This rate book shows all the standard and exceptional rates in force from that station, and also enables a trader to see how the rate can be disintegrated into its constituent parts, so as to make it possible for him to claim the proper rebate, if he does not wish to make use of all the services which are covered by the rate. Agreed charges under the 1933 Act, though not included in the rate book, are given publicity by the R.R.T., as mentioned above. This is one of the main complaints of the railway companies. They maintain that "undercutting" by road carriers is almost invited by this publicity and they say, rightly or wrongly, that in some cases at least the basis of the road carriers' calculation is neither the cost of his services, nor "what his traffic will bear," but the railway rate which he ascertains before quoting his own rates. With regard to this vital point, the question of publicity, the T.A.C. have unfortunately been unable to arrive at a definite recommendation, in view of the formidable dispute between the companies and the trading interests in this matter. It will no doubt be felt that this is a serious gap in the system of innovations inaugurated by the Report (s. 33*c*).

Other aspects of Parliament's endeavour to curb the railways in their capacity as monopolists are the provisions which force them to grant reasonable facilities to the public[14], those imposing upon the companies a system of through rates[15], and those dealing with the statutory conditions as to the liability for the safety of goods, etc., under which they carry.[16] The railway companies have given up their demand for a repeal of those provisions, and the T.A.C. accordingly does not recommend any alteration in this respect. They can, therefore, be left out of account for our present purposes.

The gist of the Report, as far as railway rates are concerned, is the proposal to repeal the whole body of statute law providing for classification of goods, standard, exceptional and agreed charges, as well as the provisions prohibiting inequality and undue preference, and to restore the companies' freedom of contract in these matters.

II

One of the features which distinguish the system of the Railways Act, 1921, from pre-War legislation is, that railway law has become a means of protecting the railway companies themselves. This was at least the intention of the legislature, though it is common ground that in this respect more, perhaps, than in others the Railways Act, 1921, has proved to be a complete failure. The standard charges were fixed in such a way as to

[13] Regulation of Railways Act, 1873, s. 14.
[14] Railway and Canal Traffic Act, 1854, s. 2. Railways Act, 1921, s. 18.
[15] Railways Act, 1921, s. 47.
[16] Railways Act, 1921, ss. 42 to 45, and Standard Terms and Conditions for Carriage. The proposals contained in the T.A.C.'s Report will necessitate a revision of the existing system of Company's Risk and Owner's Risk Conditions which is based on the difference between Standard and Exceptional Charges at Company's and at Owner's Risk. See s. 46

the licensing authorities to "take into consideration any objections to the application which may be made by persons who are already providing facilities, whether by means of road transport or any other kind of transport, for the carriage of goods" in the area in which the prospective licence holder intended to operate. It is true that this provision has no application to the so-called C Licence which has to be obtained by an "ancillary user" and which is granted as of right. But it applies to A and B Licences, i.e. to the licences to be taken out by those who intend to act as carriers for hire or reward either exclusively or partly. It is applicable not only to the granting of new but also to the renewal of existing licences and to every extension of his fleet of vehicles by a road haulier. Thus it proved to be a most effective weapon in the hands of the railway companies for the purpose of restricting the scope of activities of road carriers. The case law[20] developed under the Act emphasised the necessity of proving that there was a demand for additional carriage facilities, and it is in each case for the applicant to show that existing requirements cannot be covered by existing facilities and railway facilities in particular. If the Road versus Rail War is to come to an end, these provisions cannot be left out of account, but it would be wrong to assume that, from the point of view of the question of competition and monopoly, their importance exhausts itself in the protection of the railway companies. By making it difficult, if not impossible, for a new entrant to obtain an A or B Licence the law did not only safeguard the railway companies, but also existing road transport undertakings from additional competition. This vital point must not be overlooked. The Railway Companies, in resisting applications for licences made by new entrants served not only their own interests but also those of the existing road carriers. What they resented was the opposition of the Railway Companies against the renewal of existing licences and the extension of the business of their holders. It is not as if all road hauliers were necessarily and in every respect opposed to the Railway Companies.

No change in the provisions of the Road and Rail Traffic Act is proposed by the T.A.C., but their recommendations for the repeal of the present statutory regulation of railway charges are based on an agreement made between the Railway Companies and the "Liaison Committee on Road Transport Rates." Under this agreement the Railway Companies have undertaken "not to raise objections during the ensuing two years after they have been given their freedom" either to the renewal without any alteration of existing A or B Licences or to the granting to existing hauliers of A licences for additional vehicles, or to the granting to existing hauliers of additional B Licences for vehicles whose operations are limited to a radius not exceeding 25 miles (Appendix VI, s. 11). The Liaison Committee, on the other hand, "raises no objection to the proposals of the railways for the removal of statutory control of their merchandise charges" (ib. s. 7). This agreement is the basis of the proposals made by the T.A.C. It is expressly mentioned in the T.A.C.'s Report that the above-mentioned undertaking given by the Railway Companies is an integral part of the agreement.

[20] The leading cases are *Ridgewell and Co.* v. *Southern Railway* (1934), 22 T.C. 6, and *Enston and Co.* v. *L.M.S. Ry. Co.* (1934), *ibid.* 3. For an analysis of the case law see Ponsonby: *The New Conditions of Entry into the Road Haulage Business*, and *Economics*, 184 (May, 1937), and Walker: *Road Transport Economics and the Law*, 3 *M.L.R.* 21.

The Railway Companies have not undertaken to refrain from opposing applications made by new applicants. The peace settlement inaugurated by the Report does not include rail and road interests as a whole. It constitutes a compromise between the railways and existing road interests at the expense of those who wish to enter the business. The relief of the Railway Companies from antiquated monopolistic restrictions is not going to be opposed by the road undertakings. By way of return they are given freedom of expansion and security of tenure, but they are not to be deprived of the railways' assistance in warding off prospective competitors. There are some who think that the "Square Deal" does not mean the substitution of free competition for anti-monopolistic hindrances, but a rail-cum-road monopoly, not sufficiently curbed by legislative safeguards in favour of other carriers and the trading community.[21]

A remarkable objection is raised by the road interests against the new dispensation. The road carriers express their fear "that the case law established up to the present by the objections of the railways in the past would have the effect of visibly diminishing the value of the proposal" not to oppose certain applications for licences in future (Appendix VI, s. 12), and the T.A.C. itself regard this objection as sufficiently necessary to mention it in the body of the Report (s. 44). Jurists will observe the importance of this point for the principle of precedent in its application to decisions of administrative tribunals. Where a Court has the function of settling disputes which are the outcome of collective conflicts, a re-adjustment of the conflicting interests may be hampered by the binding effect of previous decisions rendered by the Court. The interpretation given to the Road and Rail Traffic Act by the Appeal Tribunal was the result of a conflict of interests between rail and road. It was, in fact, the making of new law, and the settlement of a social dispute of the first magnitude. The principle of *stare decisis* has a tendency of perpetuating the outcome of a given social situation beyond the point where that situation itself has changed, and of preventing the parties to the collective dispute from revising their settlement.

Even at the height of the railway monopoly there were in existence certain competing forms of transport, chiefly by water, though their activities were limited to certain types of traffic. Canal traffic and coastwise shipping have always been of importance in this country, in particular for bulky and heavy goods. Since the railways were in a better position to endure a loss on these traffics than either canal carriers or coastwise liner companies, or coastwise tramp shipping, these latter interests stood in need of protection against undercutting by the railways themselves. A number of provisions have been enacted in the past with a view to safeguarding the independent existence of canal companies and coastwise carriers.[22] The Report of the T.A.C. proposes to maintain these provisions and to adapt them to the new railway legislation and also to ease the position of those few canal owners who still act themselves as carriers. Hitherto they were still governed by a modified system of maximum rates which will disappear, if Parliament adopts the Report of the T.A.C. (s. 59).

[21] This fear is expressed by the Traders' Co-ordinating Committee on Transport supported by the Federation of British Industries and the Mansion House Association on Transport in their Memorandum printed in Appendix XX.

[22] See, for example, Railways Act, 1921, s. 39, and Road and Rail Traffic Act, 1933, s. 39.

III

If the proposals of the T.A.C. become law, the substantive law of railway rates will return to the point from which it started one hundred years ago. The common carrier at common law was under a duty not to pick and choose between his prospective customers and not to refuse a consignment offered to him for carriage, provided the goods were of the type which he professed to carry and the place of destination was within the area which he professed to serve. To demand unreasonable rates was equivalent to a refusal to carry. Thus the common law contained the germ of a control of railway rates. All the statute law governing rate making will be repealed, if Parliament gives effect to the proposals made by the T.A.C. There will be neither standard rates, nor exceptional rates, nor agreed charges, there will be no statutory classification of goods, nor will there be a statutory disintegration of rates. The railway company's remuneration for its services will be a matter of agreement with the consignor or consignee, just as road rates are at the present moment, and as all carriage rates were before railways came into being. There is only one restriction to this: The rate must be reasonable (ss. 33*a*, *b*, *f*, 37 I, III, V, VI, and 48). If the rate fixed by agreement is not reasonable, the R.R.T. can replace it by a reasonable rate. The proposals contain an enumeration of those points which the R.R.T. is to take into account when considering the reasonableness of a railway rate. They are—

(*a*) Whether or not the charge is detrimental to the public interest;

(*b*) variations in the value of currency;

(*c*) the cost of affording the service or services in respect of which the charge is made;

(*d*) the existence of any alternative or competitive transport facilities for the conveyance of the merchandise in respect of which the charge is made and the charges made for the carriage of like merchandise by such alternative means of transport;

(*e*) the effect of the charge on the financial position of the parties concerned either generally or individually;

(*f*) the charges made to other traders for the carriage of like merchandise, if it affects the trader concerned, and (see s. 48) "any charges agreed with other forms of transport (including those approved by the proposed Road and Railway Rates Tribunal) with a view to avoiding uneconomic transport charges."

Any lawyer who is familiar with the attitude of the Courts towards the conception of public interest cannot fail to be somewhat apprehensive at these proposals. Is it likely that the R.R.T. will be prepared and able to take into consideration any public interest which does not happen to be represented by counsel? Is it out of place to remember in this connexion the fate which the conception of "public interest" suffered at the hand of the Courts in connexion with restraint of trade? Will there not be a presumption that what is reasonable between the parties is also reasonable from the point of view of the public?

It is one of the T.A.C.'s recommendations that the whole existing body of law with regard to undue preference and equality of charge should be repealed (s. 33*a*). Its place is to be taken by the provisions mentioned above. The Railway and Canal Commission, therefore, will no longer be concerned with claims arising from undue preference, but it will be for the R.R.T. to take into account charges made to rival traders when

considering the reasonableness of a proposal. In this respect the law as visualised by the Report continues the development entailed in the decision in *Dole's Case* in which the R.R.T. decided that the prevention of undue discrimination was one of the matters to be taken into account by the Tribunal in connexion with an application for the fixing of an exceptional rate.[23]

The Railway Companies have arrived at a number of agreements with various trading interests, represented by the Traders' Co-ordinating Committee on Transport (supported by the Federation of British Industries), the Mansion House Association on Transport, the British Iron and Steel Federation and Agricultural Representatives, but they failed to come to terms with the Mining Association of Great Britain. The various agreements provide (see Appendices XI, XII, and XIII) for the setting up of conferences of railway and trading representatives. The T.A.C. approve of these agreements (s. 29) and make them part of their proposal for the new machinery of rate making. Before the R.R.T. can be approached in order to obtain a decision as to the reasonableness of a rate the matter must go before one of these regular periodical meetings which, however, are not to be given a statutory character (ss. 34, 35). If agreement is reached at this conference with regard to a general increase of rates, that is the end of the matter, and it is notable that no appeal to the Tribunal is provided in this case. It is considered that conformity of opinion of the Railway Companies and the trading representatives is a sufficient safeguard obviating an interference by a public authority, and a rate so fixed is obviously deemed to be "reasonable" (s. 37 I). It is only when the railways fail to reach agreement with the trading representatives as to a general increase that the necessity for a more formal proceeding arises. The companies must then give formal notice of their proposal to increase the rates, the case is brought before the R.R.T. who give a public hearing to the matter and decide whether the contemplated increase is reasonable. The companies are, however, given the privilege that they may fix an appointed day from which the increase is to take effect and the increase comes into force whether or not the R.R.T. has rendered its decision in the meantime. If the Tribunal comes to a decision unfavourable to the companies they must repay rates levied in excess of what the Tribunal deems reasonable, a statutory debt for money had and received. It might be argued that the institution of the appointed day goes a long way to giving the companies an upper hand in cases of this kind.

The procedure is somewhat different in cases in which the railway companies propose an increase in individual charges only. It is not compulsory to bring the matter before the conference in a case of this kind. All the company has to do is to give one month's notice to the traders concerned and it is then for the traders, if they cannot come to an agreement with the company, to refer the matter either to the appropriate conference and afterwards to the Tribunal or to the Tribunal directly. Again it seems that the increase takes effect as from the date fixed by the company and that the overcharge can be re-claimed if the ultimate decision is against the company (s. 37, III, IV).

Machinery is also provided for the reduction of charges. Traders or bodies of traders may approach the Tribunal with a view to obtaining a reduction of charges either on the ground that they are too high, or because

[23] Above note 11.

charges made to rival traders are lower than the charges complained of. This power given to the trading community of having existing charges revised at any time by the Tribunal is probably the most significant safeguard by which the T.A.C. try to counterbalance the great freedom of action conferred by their recommendations on the railway companies. This recommendation, however, should be read in the light of what will have to be said below about the effect of agreements between the railway companies and other carriers.

IV

When considering the Railway Companies' demands for a repeal of their existing statutory restrictions, the T.A.C. was faced with a twofold task. It had to adjust the Railway Companies' interests and those of the traders, and an attempt has been made above to show in outline how this was done. But at the same time the T.A.C.'s Report was meant to constitute the peace treaty between the railway companies and their rivals chiefly on the road. Perhaps it would be more appropriate to call it an armistice, since it is of the essence of the recommendations that they are to be of a temporary character only and to be in force for no more than five years (s. 16). The ultimate objective of the T.A.C. is the co-ordination of the systems of rail and road charges. The railway companies had originally urged the extension of their statutory restrictions to transport by road. A previous Report on Service and Rates made in 1937 by the T.A.C. had proposed to create rate structures for road hauliers and canals (see s. 7 of the present Report). In the meantime, however, the Railway Companies changed their attitude. Since it appeared that it would take a considerable time before the creation of a system of statutory charges for road transport could be thought of, they claimed that as a preliminary step their own restrictions should be removed. The British Road Federation (Appendix XVI, s. 6) and the Scottish Commercial Motor Users' Association (Appendix XVIII, s. 8) call this a "*volte-face* of the railway companies." Be that as it may, the Railway Companies have asked for the repeal of their own restrictions and succeeded at least before the T.A.C.

To these proposals they obtained the consent of all the trading interests with the exception of the Mining Association of Great Britain, since in relation to coal the railway companies are still very largely in the position of monopolists (see Appendix XIV and XV). They also obtained the consent of the representatives of their own competitors, but, as pointed out above, at the price of not opposing certain kinds of applications for A and B Licences for two years.

The basis of the T.A.C.'s recommendations providing for the protection of other forms of transport against encroachments by the now unfettered railway companies is the agreement between the Railway Companies and the Liaison Committee on Road Transport Rates (Appendix VI). This agreement has found the approval of the T.A.C. (s. 41). It provides—and so does the Report (s. 45)—for the setting up of a Central Consultative Committee representing the railway companies as well as the road haulage interests. This Central Consultative Committee which has power to appoint Regional Committees will formulate "the principles on which voluntary agreements can be entered into with regard to the charges to be made for the carriage of merchandise traffic by road and rail either generally

or in respect of particular commodities or particular routes or areas." These agreements are to provide for the conditions of carriage, for rates and charges and for the places between which these rates and conditions are to apply. They are in the nature of price fixing or trade protection agreements and are an attempt at overcoming whatever there may be of competition in the business of carriage by joining up the interests of the organised road hauliers with those of the railways and by preventing competition between the two forms of transports from having any appreciable influence on the level of the rates.

Such, however, is the structure of the road transport industry that agreements of this kind would be ineffective, unless legal machinery was provided in order to bind outsiders. We are here approaching what, from the legal point of view, is undoubtedly the most remarkable innovation contemplated by the Report. Following with some important modifications the suggestions made by the Railway Companies and the Liaison Committee (Report s. 47 and Appendix to Appendix VI) the T.A.C. recommends that observance of these agreements by outsiders as well as by those taking part in the agreement should be legally enforceable. The draft clauses contained in the agreement between rail and road interests visualise the creation of a Road and Railway Rates Tribunal charged with the duty of scrutinising such agreements and, if they think fit, extending them to outside interests. As modified by the T.A.C. the new scheme is as follows:

Agreements made between one or more railway companies and an association or associations adequately representing road carriers are first to be referred to the Minister of Transport who gives a preliminary certificate that the agreement has been so made. The view expressed by the agricultural interests that no such certificate should be given, unless the body or bodies of road carriers which have made the agreement have received a mandate expressed by a poll of the A and B Licence holders affected, is recorded by the T.A.C. but not embodied in its proposals. An agreement so made is then to be referred by the Minister to a Road and Railway Rates Tribunal. This body will be composed of an independent chairman, a railway representative, a representative of the A Licence holders, and two representatives of the traders. It will publish the application and hear objections to its approval made either on behalf of a trader or a representative body of traders or of a road carrier or representative body of road carriers. If, however, the Tribunal after a public hearing of the matter arrives at the conclusion that the agreement should be approved, then the rates and conditions of service specified in the agreement become the prescribed rates and conditions, and it is a condition of the licence of every road carrier to comply with the agreement. If he fails to do so his licence may be suspended or revoked. If, on the other hand, a railway company fails to observe the agreement, the Tribunal has power to enforce it by way of the machinery provided in the 1854 Act for the abatement of an undue preference. The T.A.C. suggests, not as part of the proposed legislation, but as a sort of gentlemen's agreement, that the traders should be consulted about these agreements before they are referred to the new Tribunal.

It would appear that these recommendations involve a new departure in the law of competition and monopoly. It is quite true that the public hearing which is to be given to objections raised by outsiders represents a certain safeguard to those who might be willing and able to supply road

services at rates lower than those contained in the agreement. Yet, if once after an elaborate mutual consultation of organised road and rail interests rates and conditions of services are settled, the *favor judicis* is likely to be on the side of the agreement and not against it. In approving the suggestion contained in the agreement between the Liaison Committee and the Railway Companies, the T.A.C. has definitely decided in favour of a system of regulated prices against free competition, but the regulation is primarily within the province of the private interests concerned, and not within the jurisdiction of those who represent the public. Legally speaking, the organised rail and road interests have been made part of the legislative machinery. The antimonopolist restrictions imposed on the railways will be replaced by a system of restrictions imposed on outsiders in the road industry by the joint action of organised interests and a judicial tribunal. The creation of standards of conduct by administrative tribunals is, of course, well known in other branches of the law, but the decisive influence given to organised interests on the fixing of those standards is particularly noticeable in these new recommendations.

Even more important than the position of outside road carriers is the question of the protection of the consumers. It is, in fact, threefold. The composition of the new Road and Railway Rates Tribunal with its independent chairman and the two representatives of commerce (the addition of a second member experienced in commercial affairs is a very important modification of the original proposals introduced by the T.A.C. itself, see s. 47, III), leaves the carriers themselves in the minority. The consultation with commercial interests before reference to the tribunal and the public hearing of objections raised by traders are additional safeguards. In spite of all this, however, there remains a lingering doubt whether the consumers will not be most detrimentally affected by this new machinery for the fixing of railway and road rates. The paramount principle to govern the fixing of railway rates by the R.R.T. is to be that those rates must be reasonable. It is provided in the recommendations (s. 48) that, when considering the question of reasonableness, the R.R.T. must have regard also to any charges agreed with other forms of transport (including those approved by the proposed Road and Railway Rates Tribunal) with a view to avoiding uneconomic transport charges. Will it be possible, legally and in fact, for the R.R.T. to declare unreasonable a railway rate based on an approved agreement with the organised road hauliers? Is it not likely that these agreements concluded between two groups of carriers will set the standard for what is to be the legal duty of the traders towards the railway companies? Does not the mutual protection against undercutting afforded to rail and road alike nullify the safeguards which the T.A.C. proposes to give to the traders against an abuse which the railway companies may possibly make of their new freedom? It would seem that, to a certain extent at least, at the very moment when the law for the first time gives effect to the railway companies' position as competitors in the market, that competitive position very largely disappears through the creation of a legal monopoly of combined rail and road interests. With some exaggeration one may say that, if these proposals become law, Parliament will have gone the whole way from antimonopolist to promonopolist legislation and not, as was claimed by the railways in their Square Deal agitation, restored the freedom of competition.

This will be the first attempt at statutory regulation of road charges. It is remarkable that this first step is in the direction of self-imposed

restrictions as far as organised interests are concerned, coupled with a considerable amount of subjection of outsiders to these organised interests.

V

The transformation of the modern legislative process is reflected in the way in which the T.A.C. arrived at its recommendations, and also in those recommendations themselves.

In November, 1938, the Railway Companies Association submitted a memorandum to the Minister of Transport, embodying the proposals commonly known as the Square Deal Demands. These were further supplemented by a memorandum submitted early in December (Appendices 1 and 2). On December 12th, the Minister of Transport remitted these proposals to the T.A.C. and in January the Railway Companies addressed a further memorandum to the T.A.C. by which they further modified their demands (Appendix V). Further memoranda were submitted in the same month to the Council by the British Road Federation, the Scottish Commercial Users Association and the Traders' Co-ordinating Committee on Transport (Appendices XVI, XVIII, and XIX). In February, however, agreements had been reached between the Railway Companies and the Liaison Committee on Road Transport Rates (Appendix VI), the Canal Representatives (Appendix VII), the Dock and Harbour Representatives (Appendix VIII), the Coastal Carriers (Appendices IX and X), the general trading interests (Appendix XI), the Iron and Steel Federation (Appendix XII), and the agricultural representatives (Appendix XIII). The recommendations of the T.A.C. summarised in this article are essentially based on the contents of these agreements.

This history of the origin of legislative proposals destined to be accepted by Parliament throws some light on the way in which agreements of organised interests underlie legislation in a modern democracy. The public interest, in so far as it is not represented either by any of the organisations parties to these agreements or in the T.A.C. itself, have, of course, an opportunity of being heard in Parliament, but is it likely that they will succeed in modifying proposals backed by the force of a bargain between all the organised interests concerned? Is there not a certain parallel between legislative measures of this kind and those "agreements" between the "estates of the Realm" which were the form of legislation on the Continent in pre-constitutional days? After all, something may be said in favour of the theory which urges "the pluralistic character" of the modern state.

The same line of thought is suggested by the proposals themselves. Again we see how a bargain between organised interests has a tendency of acquiring the form of law. In the strict legal sense of the word the organisations on all sides become instruments of the legislative process. The outsider and, very largely, the unorganised consumer, obtains a hearing, but no more. Is this the solution of the problem monopoly versus competition from the point of view of legislative machinery?

The "Square Deal" problem raises issues not only of an economic description, but also affecting the most fundamental problems of government.

O. KAHN-FREUND.

THE BANK FOR INTERNATIONAL SETTLEMENTS AND THE CZECH GOLD ASSETS HELD BY THE BANK OF ENGLAND

The facts leading up to this controversy can be summarised shortly. The B.I.S. held certain assets for the former Czechoslovak National Bank, which it deposited in the form of gold with the Bank of England. At a date not yet disclosed, following the establishment of the German protectorates in Bohemia and Moravia, the B.I.S. gave instructions to the Bank of England to hand over these assets either to the German Reichsbank or to the new Bank of Bohemia and Moravia. It is understood that these instructions have been obeyed.[1]

I. The case raises a number of legal points which are worth examination: for instance, the legal status of the B.I.S., the control of the signatory States over the board of the B.I.S., or the extent of the immunities of property granted to the B.I.S.[2] Limited space precludes more than an examination of the question whether the action of the B.I.S. can be challenged before a competent court by any of the States' signatories of the Agreements of 20th January, 1930, and on what grounds.

II. As the Bank of England held the gold on the orders of the B.I.S., it must be admitted that these assets are immune from measures of national legislation which might, in regard to holdings of this kind, extend the scope of the Czechoslovakia (Restrictions on Banking Accounts &c.) Act, 1939 (2 & 3 Geo. VI, Ch. 11), in accordance with Article X of the Agreement of 20th January, 1930, between Belgium, France, Germany, Great Britain, Italy and Japan,[3] with No. 6 of the Constituent Charter of the B.I.S., embodied in the Convention between the signatories of the above agreement and Switzerland,[4] and with Article I of the Brussels Protocol of 30th July, 1936.[5]

III. Article 2 of the Convention of 20th January, 1930, between Switzerland and the signatories of the Convention mentioned above under II provides for arbitral settlement of any dispute between Switzerland and any of the other signatories "relating to the interpretation or application of the present Convention."

The Constituent Charter of the B.I.S. and the annexed Statutes are part of the Convention.[6]

The Arbitral Tribunal for which provision is made in the Convention is established under the Agreement referred to above under II. The tribunal is composed "of five members appointed for five years, of whom one, who will be the Chairman, shall be a citizen of the U.S.A.; two shall be nationals of States which were neutral during the late war; the two others shall be respectively a national of Germany and a national

[1] *Hansard*, House of Commons, vol. 347, cols. 1927, 2092; *The Economist*, 1939, p. 495; *The Times*, 13th June, 1939.

[2] For a discussion of these questions, see Sir John Fischer Williams, "The Legal Character of the B.I.S.," A.J.I.L., 1930, p. 665 *et seq.*, and the present writer's *Die Internationalen Banken für Zahlungsausgleich und Agrarkredite*, Berlin, 1932.

[3] Cmd. 3763 (1931), p. 8.

[4] Cmd. 3766 (1931), p. 4.

[5] Cmd. 5344 (1937), p. 4.

[6] See the monograph quoted above in note 2, p. 17 *et seq.*

of one of the Powers which are creditors of Germany." A further paragraph makes provision for vacancies resulting, *inter alia*, from the expiration of the five-yearly periods of membership. Annex XII deals with details of procedure. According to Article 2 of the Convention with Switzerland, that country too may appoint a member in disputes in which she is involved.

Switzerland, as the State in which the B.I.S. is domiciled, would incur international responsibility if she permitted activities of the B.I.S. involving a violation of the Charter and Statutes of the B.I.S.

The Convention with Switzerland provides that she can bring any dispute with the B.I.S. regarding the interpretation or application of the Charter of the B.I.S. before the same tribunal (No. 11 of the Constituent Charter). As No. 2 of the Charter sanctions the annexed Statutes of the B.I.S., any dispute regarding the interpretation and application of the Statutes of the B.I.S. must be regarded as a dispute on the Charter of the B.I.S.

The Bank of England can bring a dispute involving the interpretation or application of the Statutes of the B.I.S. before the same tribunal in accordance with Article 56 of the Statutes of the B.I.S.

IV. The articles of the Statutes of the B.I.S., the interpretation or application[7] of which is involved, are Articles 22c (custody of gold for the account of central banks), 22j (other deposits from central banks), 22k (B.I.S. as agent of central banks) and 58 (definition of central bank in the meaning of the Statutes). For it is maintained that, in treating the Reichsbank or the Bank of Bohemia and Moravia as the successor to the former Czechoslovak National Bank, the B.I.S. has wrongly interpreted and applied these Articles of its Statutes.

V. The real question at issue is whether the B.I.S. is either entitled or bound to regard the Bank of Bohemia and Moravia or the Reichsbank as the owner of the gold held on behalf of the former Czechoslovak National Bank. This can only be decided on the basis of international law.

With regard to Switzerland, any League member signatory to the Convention can maintain that the recognition of the new Bank of Bohemia and Moravia or of the Reichsbank as successor to the former Czechoslovak National Bank is incompatible with Switzerland's obligations under Article X of the Covenant as interpreted by the League Assembly in its resolution of 1932. For the obligations undertaken thereunder by League members exclude recognition of situations created in contravention to the Covenant. Even assuming that League members are entitled *de facto* to recognise such changes in the *status quo*, a limited recognition of this kind would not cover the property of the annexed State or of any public corporation in foreign countries.[8]

It cannot be maintained that these contractual obligations are not opposable on the part of Switzerland or the B.I.S. to Germany as a non-member State. For Germany, as a signatory of the Treaty of Versailles, of which the Covenant forms part, is bound to admit the legality of any

[7] On the extensive interpretation of the term "application" by the Permanent Court of International Justice, see the judgments in the cases of the *Mavromatis Jerusalem Concessions* of 26th March, 1925 (A5, p. 47) and the *Factory at Chorzow* of 26th July, 1927 (A9, p. 24).

[8] H. Lauterpacht, *Receuil des Cours de l'Académie de Droit International*, t. 62 (1937), p. 296; the same writer in the previous issue of this Review, p. 9, note 14, and Oppenheim-Lauterpacht, *International Law*, vol. I (1937), pp. 139, note 4, 141, and 326.

action by League members which results from their obligations in this capacity. As Germany has never withdrawn her signature to the Treaty of Versailles as such, she must admit this limitation of the freedom otherwise enjoyed by non-member States.[9] In favour of this thesis we can quote German authors such as Professor Herbert Kraus, who was in close touch with the German Foreign Office during the Weimar Republic, and who was Professor of International Law at Göttingen University under the Nazi regime until 1937. He writes: "Germany is above all now prevented from raising objections against the League activities with regard to non-members if these activities are based on the Covenant."[10] It is also interesting to note that von Bülow, who held one of the key positions in the German Foreign Office, comes to the same conclusion: "As already mentioned, Germany and the other defeated Powers of the World War have recognised the competence of the League. In doing so, they have, however, not acquired the protection of the League."[11] It follows that the B.I.S. has to apply international law as valid between League members when deciding whether the Bank of Bohemia and Moravia or the Reichsbank is the successor to the former Czechoslovak National Bank. It is therefore submitted—

(1) that the arbitral tribunal established under the Agreement of 20th January, 1930, is competent to decide a dispute on this question

(*a*) between any of the signatories and Switzerland;
(*b*) between Switzerland and the B.I.S.;
(*c*) between the Bank of England and the B.I.S.;

(2) that the dispute is concerned with the interpretation and application of the Statutes of the B.I.S.;

(3) that, in transferring the holdings on behalf of the former Czechoslovak National Bank either to the Bank of Bohemia and Moravia or to the Reichsbank, the B.I.S. has wrongly interpreted and applied its statutes.

G. SCHWARZENBERGER.

[9] For a fuller discussion see the present writer's *The League of Nations and World Order. A Treatise on the Principle of Universality in the Theory and Practice of the League of Nations*, London, 1936, pp. 105 *et seq.*

[10] *Vom Wesen des Völkerbundes*, 1920, p. 38 *et seq.*

[11] *Der Versailler Völkerbund*, 1923, pp. 185, 186 and 278.

REPORTS OF COMMITTEES

The Official Secrets Act—Report of the Select Committee 1939

This committee was appointed as a result of the *Sandys Case* in June, 1938. A discussion of the case and of the committee's report thereon will be found in the MODERN LAW REVIEW, Vol. II, pages 163 and 231. The present report makes no further mention of these matters, and is confined to an examination of the Official Secrets Acts, 1911 and 1920, in relation to their bearing upon privilege of Parliament.

It is freedom of speech which is principally in issue and the committee express the decided opinion that this privilege protects Members of Parliament from prosecutions under the statutes in question so far as words spoken in debate or in the course of Parliamentary proceedings are concerned. The argument that privilege cannot protect against a criminal offence is brushed aside with the ingenious reply that crimes committed by a member otherwise than in his capacity as a Member of Parliament will not be protected. This test may not be so easy to apply as appears at first sight; for example, would it have furnished a valid defence to a prosecution for assault in the recent case where during the proceedings of the House of Commons one member struck another?

The only question in regard to this part of the discussion on which the committee are hesitant is as to the scope of the term "proceedings in Parliament." They are clear, however, that it goes so far as to cover "both the asking of a question and the giving notice of such question, and includes everything said or done by a member in the exercise of his functions as a member in a committee of either house." They think that there may be cases where the privilege goes still further, but beyond referring to communications passing between members or between a member and a minister, which they think in certain cases would qualify for privilege, they are rightly hesitant to hazard any opinions. It will be observed, however, that the actual incidents of the *Sandys Case* are covered by these passages of the report. On the other hand, they have no doubt that a member who discloses official secrets in a speech to his constituents has no claim for protection.

Perhaps the most troublesome question discussed is as to how far s. 6 of the 1920 Act applies to Members of Parliament. This section imposes the duty of giving information to the police about offences or suspected offences. The point here would be most likely to arise, as in the *Sandys Case*, where some speech made in Parliament indicated that the speaker had received information which could only have come to him after an offence under the Acts. The committee are hesitant upon this topic, which is in the writer's view of greater practical importance than they will allow, and this part of their report is the least satisfactory. They appear to think that such a case is not directly covered by parliamentary privilege, although indirectly the member might obtain some protection from the rule that no evidence can be given of debates or proceedings in Parliament except by leave of the house in which they took place. The committee also mention various reasons why in their opinion the question is not likely to come to an issue, overlooking the fact that it is pretty obvious that these safeguards would not have operated in the *Sandys Case* itself but for the energy and courage of Mr. Sandys. Nor do we think that their

confidence in the Bill at present before Parliament to modify the operations of the Official Secrets Acts is altogether justified. The truth is that modern political developments call for new extensions in the domain of parliamentary privilege, and it is a pity that the committee did not face up to this fact more frankly.

The committee express the important opinion that parliamentary privilege can only be abrogated by express words in a statute, a view shared by the law officers: this in reply to a suggestion that the Official Secrets Acts had by implication removed the privilege in respect of the matters within the mischief of the statutes.

Finally, we may note the use made by the committee in reaching their decisions of American and Canadian case law. The problem of securing full liberty of discussion in sovereign democratic assemblies is essentially the same in all countries. It is, nevertheless, interesting to find that the mother of parliaments is not above making use of the experiences of her daughters, a phenomenon which is perhaps observable in other walks of life at the present time.

R. S. T. C.

Law Revision Committee Eighth Report (Contributory Negligence)

The present Report shows no wavering or disagreement in recommending a reform which has long been felt to be overdue, by a consensus of legal opinion in the country. Its conclusions are best summarised in the Committee's own words—

> "That in cases where damage has been caused by the fault of two or more persons the tribunal trying the case (whether that tribunal be a judge or a jury) shall apportion the liability in the degree in which each party is found to be in fault."

This recommendation is designed to bring the Common Law into line with the Admiralty Law. The practical superiority and justice of the Admiralty Law, as laid down in s. 1 of the Maritime Convention Act, 1911, in accordance with the International Convention signed at Brussels in 1911, has hardly ever been doubted. But the Committee rightly points out that the ability to apportion the blame has also made it possible for the Admiralty judges largely to ignore the causation problem with which Common Law judges, owing to the very iniquity of the Common Law rule, have been faced. True, the Admiralty Law, like the Common Law, recognises the doctrine of the last opportunity whose principal object it was to allocate responsibility to one party only. But under the stress of modern developments, in particular the growing rapidity of modern traffic, which in most accidents eliminates the time interval between the acts or omissions of the two parties, both Common Law and Admiralty Courts had gradually modified the doctrine and substituted for the last opportunity test the question who was substantially responsible for the accident.[1] The decisive difference was that Admiralty Courts, since 1911 at any rate, could find that both parties contributed to *cause* the accident, and, on that basis, could proceed to allocate liability in proportion to the degree of negligence to each side; whereas the Common Law Courts, compelled to allocate liability to one side only, tended to mix up questions of causation and of responsibility. The Report traces and approves the development

[1] *Cf.* 1 M.L.R. 318, ssq.

which from the "last opportunity" test as formulated in *Davies* v. *Mann* has led to the modern test (mainly through the *Volute case*,[1] *Swadling* v. *Cooper*,[2] *McLean* v. *Bell*[3] and the *Eurymedon*[4]) which, as submitted in an earlier contribution to this journal[5] is: "Who is substantially responsible for the accident." (Up to this point Admiralty and Common Law go the same way, but then they must part company, as the law stands at present. Admiralty can apportion, Common Law must ignore, the minor guilt of the one side and allocate full liability to the side with the major guilt. Where the guilt is roughly equal, as in so many accidents, the solution must be arbitrary.) The Report substantially follows the same line of reasoning, but it is respectfully submitted that it introduces an element of confusion, by stating (p. 16)—

> "The question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong?"

This, it is submitted, goes back, in form at least, to earlier decisions like *Spaight* v. *Tedcastle* (1881), 6 App. Cas. 219, which, by distinguishing between proximate and remote cause, etc., tried to solve the problem in terms of causation. But leading textbooks as well as recent decisions have recognised that the latter cannot be solved by causation theories, since in practically all cases of contributory negligence which come to the Courts, both parties have caused the accident, and the question is one of weighing responsibilities. The matter has been most clearly formulated by Lord Wright in *McLean* v. *Bell* (1932), 147 L.T. 262—

> ". . . as matter simply of causation her acts formed a necessary element in the final result, since without them no accident could have occurred. The decision, however, of the case must turn not simply on causation but on responsibility; the plaintiff's negligence may be what is often called *causa sine qua non*, yet as regards responsibility it becomes merely evidential or matter of narrative, if the defendant acting reasonably could and ought to have avoided the collision."

Scott, L.J., in the *Eurymedon* (1938), P. 41, pp. 57–8, argued in the same vein. Lord Sumner in *Loach's Case*,[6] on the other hand, uses somewhat contradictory language, when he says—

> "The question is one . . . of the cause legally responsible for the injury. . . . It (the inquiry) is in search not merely of a causal agency but of the responsible agent."

In substance there is probably little disagreement that what matters is responsibility, since a satisfactory test by which to distinguish legally relevant from legally irrelevant causation has not and will not be found. Once the Committee's recommendation is adopted, Common Law Courts, too, will worry little about causation and get busy about apportioning blame. But for the teaching of the law it would, it is submitted, have been helpful if the Report had unmistakably stated what recent decisions have emphasised, that contributory negligence cases are only such cases where

[1] [1922] 1 A.C. 129.
[2] [1931] A.C. 1.
[3] [1932] 147 L.T. 262.
[4] [1938] P. 41.
[5] 1 M.L.R. 138.
[6] [1916] 1 A.C. 719.

both parties have caused the accident, whether they cause it by inter-dependent or by independent acts, and that the task of the Court is to weigh responsibilities.

Apart from the learned and interesting account of the development of the law of contributory negligence, the Report contains some further noteworthy observations. It states that there is no reason why the principle of apportionment should not be extended to all torts where contributory negligence is a relevant factor, and not be confined to the tort of Negligence. Thus it ought to apply to negligent injury to person or property (but not, of course, to such torts where it is immaterial whether they be committed intentionally or negligently, like Defamation). As the Report rightly says, there is no reason why it ought not also to apply where the injury results in death (in fact, it is difficult to see any problem at all in this question). On the other hand, the recommendations do not extend to the Workmen's Compensation Act, which occupies, of course, a special position and has special provisions, to which the principles of apportionment would not be applicable in the same way as to contributory negligence.

W. FRIEDMANN.

NOTES OF CASES

Tort Committed on British Ships on the High Seas

Canadian National Steamship Co. v. *Watson*, [1939] 1 D.L.R. 273, is a decision of the Supreme Court of Canada (on appeal from the Quebec Court of King's Bench, Appeal Side: 64 Que. K.B. 11) which is worthy of attention from English lawyers at a time when the International Maritime Committee has under consideration the question of torts committed on the high seas. The action was by a seaman (the respondent) against his employers, the owners of the British ship registered at Vancouver, British Columbia, on which the plaintiff was serving when he was injured through the negligence of a fellow servant. At the time of the accident the ship was on the high seas.

The well-known dicta of Lord Macnaghten in *Carr* v. *Fracis Times & Co.*, [1902] A.C. 176, 186, and of Willes, J., in *Phillips* v. *Eyre*, L.R. 6 Q.B. 1, 28, express the law of the Province of Quebec, the *lex fori* in the case noted, applicable to an action for damages in respect of personal injuries due to a tortious act committed outside that Province: *O'Connor* v. *Wray*, [1930] 2 D.L.R. 899. It is therefore essential that the plaintiff prove an act or default actionable by the law of Quebec and "not justifiable" by the *lex loci delicti*. The Chief Justice of Canada, delivering the judgment of himself, Crocket, Kerwin, and Hudson, JJ., said that "justifiable" here refers to legal justification, and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than "justifiable" within the meaning of the rule: see *Walpole* v. *Canadian Northern Railway Co.* (1922), 70 D.L.R. 201, 205, [1923] A.C. 113, 119.

While it is part of the plaintiff's case to establish that the tort charged is non-justifiable by the *lex loci delicti* in the sense mentioned, he is entitled to call in aid the presumption of law that the general law of the place where the alleged wrongful act occurred is the same as the *lex fori*. If the defendant pleads as a defence some difference between the law of the locality and the law of the forum the onus is upon him to prove it.

Among other defences, the appellants pleaded that as the ship was British the law governing their liability for acts done by officers and crew on board the ship was the English Common Law, by which they were under no liability because of the doctrine of common employment. That doctrine is not part of the law of Quebec.

The respondent contended that the case was governed by s. 265 of the Merchant Shipping Act, 1894, which is in force in Quebec. That section provides that where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in the Second Part of the Act any provision on the subject which is thereby expressly made to extend to that ship, the case is to be governed by that provision; but if there is no such provision, the case is to be governed by the law of the port of registry. The Chief Justice of the Quebec Superior Court held that the section applied, that the law applicable was therefore the law of British Columbia, and that, as the law of British Columbia was neither pleaded nor proved, he was bound to give judgment on the assumption that the law of that Province is the same as the law of Quebec. Consequently the doctrine of common employment, which in fact is contained in the law of British Columbia, afforded no defence to the action.

This view of the law was upheld by the Quebec Court of King's Bench (Appeal Side) and, on further appeal, by the Supreme Court of Canada.

Mr. Walter S. Johnson states in his *Conflict of Laws with special reference to the law of the Province of Quebec* (Vol. III (1937) at p. 400) that the general principle with regard to torts (other than those arising from collisions) on the high seas is that "when one person does injury to another on board a ship on the high seas, the act is governed by the law of the country to which the ship belongs." The same view is stated, also without qualification, in *Halsbury's Laws of England* (Hailsham Ed., Vol. VI, p. 282), Cheshire's *Private International Law* (2nd Ed., p. 306), and Dicey's *Conflict of Laws* (5th Ed., pp. 777, 778). *Cf. Restatement of the Law of Conflict of Laws*, s. 406; J. H. Beale, *Conflict of Laws*, Vol. II, p. 1329, s. 406. The law of the country to which the ship belongs is usually stated to be the law of the flag, but this does not necessarily coincide with that of the port of registry or with that of the "home port." The port of registry commends itself because it must be unambiguous, while the "home port" may be doubtful, although a ship generally has more real connexion with this than with the port of registry. In the case noted application of the statutory provision qualifies the suggestion of Professor Dicey (*op. cit.*, p. 777, note (*e*)) and Dr. Cheshire (*op. cit.*, p. 306) that the English law of torts applies to British ships not in territorial waters, and it supplies Dicey's question (*ibid.*) on the law applicable to a British ship registered in Scotland an answer which appears to be contrary to that writer's expectations. Dr. Cheshire also states (*op. cit.*, p. 306) that in an action in England on a tort committed on a foreign ship on the high seas the plaintiff must prove that the act is actionable by the law of the flag and is also actionable by the law of England, but *Canadian National Steamships Co.* v. *Watson* (*supra*) serves as a reminder that an English Court seised of an action concerning a foreign tort takes judicial notice of the actionability under English law once the facts are proved, and the *lex loci delicti* is, in the absence of evidence to the contrary, presumed to be the same as the *lex fori*.

M. E. BATHURST.

International Effect of Currency Restrictions

It is hardly possible to over-emphasise the commercial and legal importance of currency restrictions in the present world. A large and increasing proportion of international trade is done with and between countries the inhabitants of which are not free to fulfil their commercial engagements without some sort of official authority and are precluded from disposing of their foreign assets. The legal questions which arise from these restrictions are manifold and extremely complicated, and an almost terrifying body of case law has grown around them, on the Continent as well as in America. In view of the prominence of international trade in the commercial life of this country it is somewhat surprising to find that the English Courts have had very little opportunity, so far, of pronouncing upon the international effect of currency restrictions, though a considerable part of British exports goes to countries labouring under currency legislation and a not insignificant part of the commercial credits granted by City houses is affected by such laws.

It was the typical international financial transaction known as "acceptance credit" which came before Branson, J., and the Court of

Appeal in *Kleinwort, Sons and Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Creditbank*, [1939] 2 All E.R. 782 and [1939] 3 All E.R. 38. The plaintiffs, a firm of London bankers, had agreed to accept bills of exchange drawn on them by the first defendants who had promised to provide on maturity the funds covering the amount of the bills. This promise had been guaranteed by the second defendants, one of the leading Hungarian banks. These credit facilities had been opened long before 1931 when currency restrictions were for the first time introduced in Hungary. Simultaneously, and in close connection with the currency legislation, a committee of English and other foreign bankers entered into a standstill agreement with the Hungarian National Bank by which they undertook for one year not to cancel credit facilities granted to Hungarian firms. The standstill agreement was renewed from year to year and the plaintiffs adhered to it until 1937, when they declined to enter into the renewed standstill agreement then concluded. The practice of accepting new drafts for those which had matured was, however, continued, and so were the guarantees given by the second defendants. Thus a number of bills were accepted by the plaintiffs in April, 1938, and when they matured in July, 1938, and the plaintiffs refused to renew their acceptances, the first defendants failed to provide cover and the second defendants did not implement the guarantee. Thereupon the plaintiffs sued both defendants for the amount of the acceptances.

The defendants relied in the first place on a letter which had been regularly sent to the plaintiffs and which was to the effect that both defendants would only be in a position to provide cover on maturity if the exchange regulations prevailing in Hungary at that date would enable them to do so. The Court had no difficulty in disposing of the argument that this letter limited or "conditioned" the promise to provide cover. It was nothing but an intimation that in certain circumstances they would be unable to perform their contract, but it in no way impaired the validity and the absolute character of that promise.

The second defence, however, gave the Court an opportunity of elucidating some important points of international currency law. Both defendants contended that, by reason of the Hungarian currency legislation, it was illegal for them to pay sterling in London without the permission of the Hungarian National Bank, and that that consent had been refused. They were, so they said, prevented by law from either sending money out of Hungary, or from disposing of any assets they held in England or in a third country, and they alleged that this constituted an illegality of performance according to the law of the country in which they resided. They argued that an English Court could not compel them to do an act by which they violated the laws to which they were subjected.

The legal relevance of this defence obviously depended in the first place on the question, which system of law was applicable to the contract between the parties. If Hungarian law governed the contract, performance was illegal by the proper law, and the plaintiffs could only succeed if the English Courts refused to apply the Hungarian currency legislation, either on the ground that they were against English international public policy, or because they were foreign revenue laws which an English Court would decline to enforce. If, however, English law was to be applied, the Hungarian legislation could assist the defendants only if they could bring themselves under the rule laid down by the Court of Appeal in *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*, [1920] 2 K.B. 287.

Branson, J., and the three Lord Justices in the Court of Appeal were unanimously of the opinion that the proper law of both contracts before the Court was English. It was in the English language, and English law was the *lex loci contractus* as well as the *lex loci solutionis*. This is in itself a ruling of great importance. In spite of the central place occupied by international acceptance credits in the daily routine business of the City, no English Court had ever before decided that English law governed these transactions. It is unnecessary to point out that this question has nothing to do with the principles of Private International Law applicable to bills of exchange themselves which are contained in s. 72 of the Bills of Exchange Act, 1882, and in such decisions as *Embericos* v. *Anglo-Austrian Bank*, [1905] 1 K.B. 677, and *Koechlin* v. *Kestenbaum*, [1927] 1 K.B. 889. The case under review was concerned with the acceptor's contractual right to be indemnified by the drawer for whose accommodation he has accepted a bill and this, of course, is not a right arising from the bill itself. Yet, though legally quite separate from the bill, the contract between drawer and acceptor which underlies the acceptance is commercially closely connected with the bill, and it is worth while to reflect on the position of the English acceptor of a bill drawn abroad, taken as a whole, i.e. on the combined effect of the present decision and the principles of the law of bills of exchange. If the ultimate holder is, as usual in such cases, an English discounting house, the English acceptance house is unlikely to be affected by any questions of foreign law, with this exception that the interpretation and essential validity of a foreign endorsement is governed by the law of the place where the endorsement was made.

The defendants argued that even if English law was the proper law, the contract had become unenforceable under the well-known rule laid down by the Court of Appeal in the *Ralli* case. In rejecting this defence, MacKinnon, L.J., emphasised that supervenient illegality under foreign law can only excuse performance if that foreign law is the *lex loci solutionis*. "This is no contract to do anything in Budapest, or elsewhere in Hungary. It is a contract to do something in London. . . . If this contract had been to pay money in Budapest, no doubt that principle (the *Ralli* Rule) would have applied. The law of Hungary would have been the *lex loci solutionis*. In this case, however, the payment of the money was to be made in England, and English law is the *lex loci solutionis*." The *Ralli* principle does not enable a debtor under an English contract to rely on the law of his nationality or domicil or residence. Whatever any of these systems may have to say about the legality of the performance is quite immaterial. The *Ralli* case does not introduce the "*statut personnel*" into the law of contracts. It is otherwise, of course, if any one of these systems happens to be the *lex loci solutionis*. This is the true purport of the *Ralli* principle and "a very emphatic negative" was given by du Parcq, L.J., to the defendants' suggestion that a foreign sovereign could prevent his subjects from performing their English contracts outside the territory of the sovereign. Whether or not that performance necessitates the doing of an act within the territory of the foreign sovereign which infringes his law is quite irrelevant. Any other decision would violate the most elementary principles of the comity of nations, as was pointed out both by Branson, J., and by du Parcq., L.J.

The true basis of the *Ralli* rule is still in the dark. Does English municipal law imply a contractual term that performance shall be excused, if forbidden at the place of performance or does English Private International

Law submit the legality of the performance to the *lex loci solutionis*? Du Parcq., L.J., observed that this may make a difference in a case in which a party expressly undertakes to perform a contract in a foreign country, whatever the law of that country may say about the legality of the performance. An express undertaking of this kind would displace the *Ralli* rule, if the latter operated as an implied term only, and the party would be liable to perform the contract though performance was illegal at the *locus solutionis*. If, however, as Dicey (*Conflict of Laws*, 5th ed., Rule 160, Exception 3) thinks, the legality of the performance is governed by the *lex loci solutionis* as such, then an undertaking to violate this law would be void. The learned Lord Justice preferred to follow Dicey and to state the rule as a principle of Private International Law, but it was not necessary to decide this point in the case before the Court. Whichever be the true interpretation, it is notable that Branson, J., was inclined to restrict the scope of the rule to cases in which performances *of necessity* involves the doing of an act infringing the *criminal* law of the foreign state.

The defendants also relied on the well-known dictum of Lord Sankey, L.C., in *De Béeche* v. *South American Stores Ltd. and Chilean Stores Ltd.*, [1935] A.C. 148, 156, that "it can not be controverted that the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has resolved it illegal to do." These words were given a restrictive interpretation both by Branson, J., and by the Court of Appeal. The dictum is nothing but a re-statement of the *Ralli* rule, i.e. it must not be read as if it extended the scope of foreign currency legislation to cases in which that legislation does not form part either of the proper law of the contract or of the *lex loci solutionis*. It was also made quite clear by Atkinson, J., in the course of the argument before the Court of Appeal, that Chilean law was the proper law in the *De Béeche* case, so that the case itself is deprived of much of its importance as a precedent. (See on this point Mann, *Legal Aspect of Money*, p. 264.) The result is that a person resident in a country with currency restrictions can be compelled to satisfy out of his foreign assets contractual debts subject to English law which are to be performed outside his own country, although he is forbidden by his own law to dispose of those assets.

The effect of foreign currency laws in cases in which the currency restriction forms part either of the proper law or of the *lex loci solutionis* is still far from clear. Even if Hungarian law had been the proper law of the contracts before the Court, it might have been against English international public policy to allow the Hungarian debtors to shelter themselves behind the walls of the Hungarian currency legislation. It was suggested in the course of the argument by du Parcq., L.J., that foreign currency legislation might stand on the same footing as foreign revenue laws which English Courts will not enforce, but as Hungarian law had no claim to be applied at all, it was unnecessary to follow up this line of reasoning. The question remains open, whether English Courts will allow a defendant successfully to plead a foreign currency law as a defence against a contractual claim, if the contract is governed by that foreign law and—unlike the contract in *De Béeche's* case—to be performed in this country. This question goes to the root of the matter. There are strong reasons why such a defence should be rejected, although they may have to be found in the general principles of *ordre public international* and of the strictly territorial effect of confiscatory laws rather than in the special rules applicable to

revenue laws. (On these points and on the Continental and American case law, see Mann, *op. cit.*, pp. 261–268, also the recent article by Weiden, "Foreign Exchange Restrictions," *New York University School of Law, Contemporary Law Pamphlets*, Series 1, No. 11).

O. KAHN-FREUND.

Wages Re-gained and Lost.—Workmen's Compensation Act and National Health Insurance Act

Though *Marrison* v. *Bell*, [1939] 1 All E.R. 745, decides only a small point it may in the future be regarded as the beginning of a new approach to the law of master and servant. The facts are of the simplest kind. The plaintiff had for many years been employed as a salesman in the defendant's business, where he received a weekly wage of some £3. On 4th December, 1937, he was taken ill, and did not return to work until 26th March, 1938, when he was given a week's notice to terminate employment. During his illness the plaintiff had received sickness benefit under the National Health Insurance Act, 1936, but no wages. These he sought to recover by the present action. The defendant pleaded the panacea of the implied term according to which no wages were due during sickness, and, in the alternative, breach of contract; the County Court Judge accepted the first plea and dismissed the action. On appeal that judgment was upset, and it was held, following the line of cases beginning with *Cuckson* v. *Stones* (1858), 1 E. & E. 248, that sickness did not terminate the employment, and that there was no implied term in contracts of employment relieving the employer from his obligation to pay wages during that period. Lastly, and this was the new point, the Court of Appeal held that receipt of sickness benefit under the National Health Insurance Act did not give the employer a right to withhold wages. It had been argued that benefits under that Act were in their nature similar to workmen's compensation, but Scott, L.J., who delivered the only judgment, held otherwise. The learned Lord Justice admitted that no wages were payable during receipt of workmen's compensation, but this did not apply to benefits under the National Health Insurance Act. These "are in their nature additional benefits conferred on the classes who come within the scope of those Acts, being mostly persons engaged as workmen. Those benefits are intended to be an addition to such financial emoluments as the workman may have during his life, to improve his position by giving him medical assistance, disablement benefit and others of a long list of additional benefits which will improve his lot. Those benefits are, in their nature, irrespective of the amount of wages as determined by the workman's individual contract of service. Rights are given independently of any relation between the rights and the wages as a general principle through the Acts, and there is absent—at any rate from most of the earlier Acts, and certainly from the Act of 1936—any such ground as there is in the Workmen's Compensation Act for supposing that Parliament intended by the Act which conferred the benefits of Health Insurance to take away from the workman any right to wages that he might have."

Lord Justice Scott also thought that his decision would not work any social hardship on employers, since they had a perfect right to give notice, and most persons were employed by the week only. Employers' organisations will no doubt be grateful for this hint.

It was mentioned in passing, but not decided, as unnecessary for this case, that illness may frustrate a contract of employment in special circumstances, e.g. *Poussard* v. *Spiers & Pond* (1876), 1 Q.B.D. 410.

The decision gives rise to the following observations. First as to its basis, the comparability of payments under the Workmen's Compensation Act and the National Health Insurance Act. Neither of these statutes says anything about wages paid under a contract governed by the common law, and, applying the canon of construction that a statute can only repeal the common law expressly or by necessary implication, there seems no valid reason why either of the above-mentioned Acts should disentitle the workman from claiming wages in addition to compensation or benefit, as the case may be. With regard to the Workmen's Compensation Act it may well be argued that since that Act expressly provided that no compensation should be paid where damages had been recovered at common law, and since the other common law right, namely, that to wages, was not mentioned, the statute did nothing to impair it. Indeed Cozens-Hardy, M.R., in *Warburton* v. *Co-operative Wholesale Society, Ltd.*, [1917] 1 K.B. 663, at p. 665, doubted the correctness of the decision in *Elliott* v. *Liggens*, [1902] 2 K.B. 84, where a Divisional Court had laid down that wages and workmen's compensation were incompatible. The latter decision has, however, perhaps stood unchallenged for too long to be overruled now.

Though Scott, L.J., did not say so in so many words this may have been in the back of his mind when he accepted that view, and it possibly influenced his subtle, if not altogether convincing, reasoning with regard to the difference between payments of compensation and benefit; not convincing because the result is accidental. It would have been quite possible for the framers of the National Health Insurance Act to grade the cash benefits according to the recipient's wages. Had that been so, and we are not entitled to inquire into the motives why it was not done, the reasoning in *Marrison* v. *Bell* would fall to the ground. The distinction seems therefore somewhat artificial.

This artificiality is increased by the vague reference to the intention of the legislature, which, we are told, in the one case did, and in the other did not, "intend" to exclude the right to wages. As long as we are forbidden to use any work preparatory to the statute it seems dangerous to allude to this at all, except in the clearest of cases. What it amounts to here is that Scott, L.J., no doubt on excellent grounds, believes it to have been the intention of Parliament.

The decision puts a new stone into the building of our law, and has been welcomed by many wage earners. Too great hopes should, however, not be raised, for in future employers will simply give one week's notice when an employee falls ill, and a job which otherwise might have been kept open for weeks, may now be lost in a few days.

Moreover, the case is a reminder of the weekly wage earner's insecurity in respect of the law governing his contract of employment, and it would seem that the time has come for a codification coupled with judicious reform on the lines of the Landlord and Tenant Act, 1927. If *Marrison* v. *Bell* should contribute to move the forces which might ultimately produce a Master and Servant Act, this case, though it probably takes away more than it gives to the worker, will have served a useful purpose.

O. C. GILES.

British and Palestinian Nationalities

The decision of the Court of Criminal Appeal in *R.* v. *Ketter* (55 T.L.R. 449) turned on the issue of whether a person, who was born a Turkish subject before the Mandate for Palestine came into operation, could claim British nationality. The Court held that the appellant was not a British subject.

As this case is the first in which a British Court dealt with the matter, it may be appropriate to examine in some detail the legal questions involved and the interpretations given by the Court of Criminal Appeal of the Treaty of Lausanne, of the Palestine Mandate, of the Palestinian Citizenship Order, 1925, and of the British Nationality Act.

1. Article 30 of the Treaty of Lausanne, in which Article 123 of the Treaty of Sèvres has been incorporated verbatim, stipulates that Turkish subjects habitually resident in territories detached from Turkey become *ipso facto* subjects of the State to which such territory is transferred.

It is commonly accepted that the situation created by the Treaty of Lausanne concerning the "A" Mandates can neither be interpreted as a cession nor as an annexation, but must be regarded as an act of dereliction on the part of Turkey, followed by the creation of an international trusteeship, to be exercised by the Mandatory on behalf of the League of Nations (A. D. McNair, "Mandates" in *The Cambridge Law Journal*, Vol. III (1928), p. 155; James C. Hales, "Some Legal Aspects of the Mandate System," *Transactions of the Grotius Society*, 1938, Vol. XXIII, p. 95 *et seq.*). It follows from this that the military occupation of Palestine by Great Britain has not led to the acquisition of sovereign power by the Mandatory over the mandated territory, since the Mandatory is exercising its rights under the mandate *alieno nomine*, and that, with the completion of the act of dereliction by Turkey, the former Turkish subjects habitually resident in Palestine lost their original Turkish nationality.

As Palestine was never transferred to the sovereignty of Great Britain, it must be assumed that Article 30 of the Treaty of Lausanne referred only to those other parts of Turkey over which other States were receiving full sovereign rights. (J. Stojanowski, *The Mandate for Palestine*, London, 1928, p. 263 *et seq.*). This interpretation of Article 30 was endorsed by the Court of Criminal Appeal.

2. The Court further held that none of the provisions (Preamble and Articles 1, 5, 7, and 12) of the *Mandate Treaty for Palestine* which were adduced by the appellant in any way supported the appellant's claim that "the true effect of this is that His Britannic Majesty accepted the mandate in respect of Palestine and undertook to exercise it on behalf of the League of Nations in conformity with the provisions contained in it" (at p. 450).

3. According to Part I (1) of the *Palestinian Citizenship Order*, 1925 (Statutory Rules and Orders, 1925, No. 777), made in exercise of the powers of the Crown under the Foreign Jurisdiction Act, 1890, Turkish subjects habitually resident in Palestine on August 1st, 1925, were to become Palestinian citizens. As, according to Article 7 of the Mandate, the administration of Palestine was to be responsible for enacting a nationality law, and as the Palestinian Citizenship Order was enacted by the Mandatory, the appellant maintained that at least the first paragraph of this Order was null and void, being in contradiction to Article 7 of the Mandate. It must be admitted that the Mandate Treaty distinguishes between functions entrusted on the one hand to the Mandatory (Articles 1, 2, 3, 5, 9–21, 24–26) and, on the other hand, to the Administration of

Palestine (Articles 4, 6, 7, 11, 15, 17, 18, and 23), but it cannot be sustained that the distinction amounts to more than a division of labour within one and the same administrative organisation, which may be modified at the discretion of the Mandatory (see the present writer's *Das Völkerbunds-Mandat für Palästina*, Stuttgart, 1929, p. 95).

The Court rejected this view, but expressed the opinion that, even granting this assumption, "the result would be that the appellant remained a Turkish subject and not that he became a British subject" (at p. 450). While fully concurring with the latter part of the statement, it is submitted that in view of Turkey's dereliction of Palestine (see above under 1), former Turkish subjects would have to be regarded as stateless, provided they had not acquired Palestinian citizenship (*cf.* McNair, *loc. cit.*, p. 155).

4. It follows from the legal status of the Mandatory that, at least in the case of an "A" Mandate, the appellant was not born "within His Majesty's dominions and allegiance," as this term is used in s.I. (I) (*a*) of the British Nationality and Status of Aliens Act, 1914 (4 and 5 Geo. V, c. 17) and 1918 (8 and 9 Geo. V, c. 38). For it can be regarded as an established principle that only a territory under the complete sovereignty of the Crown can be regarded as a British dominion (E. F. W. Gey van Pittius, *Nationality within the British Commonwealth of Nations*, London, 1930, pp. 20–21, 37 and 190). The appellant, therefore, was subject to such measures as were authorised against aliens in s. 2 (6) and 27 (1) in the British Nationality and Status of Aliens Act.

This position could not be affected by the fact that the appellant was in possession of a passport entitled "British Passport—Palestine," issued by the High Commissioner in Palestine. Although, as the jury added in a rider to its verdict, it is true that the words on the passport may prove misleading, the real meaning of this phrase becomes evident, if it is remembered that in accordance with Article 12 of the Mandate, the Mandatory is entitled to afford diplomatic and consular protection to citizens of Palestine when they are outside its territorial limits.

5. Finally, it may be stated that this decision, with which no fault whatsoever can be found, apart from the one minor point mentioned under 3, is fully in accordance with the rulings of the High Court of Palestine in *Attorney-General* v. *Goralschwili and Another* (*Annual Digest*, 1925–1926, Case No. 33), of the Egyptian Mixed Courts of 15th December, 1925, in *Saikaly* v. *Saikaly* (*ibid.*, Case No. 34) and of the High Court of Uruguay of 7th March, 1928 (*ibid.*, 1927–1928, Case No 27).

G. SCHWARZENBERGER.

Income Tax Cases

The decision of the Court of Appeal in *B. C. Utting & Co. Ltd.* v. *Hughes*, [1939] 2 K.B. 231, when the decision of Macnaghten, J.—discussed at 2 *M.L.R.* 322—was reversed, is of considerable importance to speculative builders. It will be recalled that this case turned, *inter alia*, on the point whether unrealised freehold reversions, or more commonly "ground rents," were to be treated as part of the builder's stock in trade and brought into the credit of his accounts, like unsold houses, at cost or market value, whichever was the lower, or whether they represented part of the proceeds of the sale of the house and land, to be taken into account at the full market value, since ground rents are readily saleable.

The Court of Appeal held that the freehold plots of land on which the houses stood had not been realised as assets; they were still retained *unsold* subject to a term of 99 years and were therefore properly treated as the builder's stock in trade and valued at the lower cost price. The apparently contrary decision of the House of Lords in *Inland Revenue* v. *John Emery & Son*, [1937] A.C. 91—discussed at 1 *M.L.R.* 163—was distinguished on the ground that when a house and land is sold in Scotland for cash and a ground-annual (cf. the English rent-charge), the taxpayer has disposed of his *entire* interest in the land and has become merely the owner of a rent-charge, whereas, in *Utting*'s case, the builder still continued to be the owner of the land, subject to alienation of a *partial* interest represented by the term of years.

The interpretation thus placed on the decision in *Emery*'s case seems open to question; though *dicta* can be adduced to show that the case turned upon the speculative builders' disposal of their *entire* interest in the land, the real *ratio decidendi* appears to have been that, since the ground annuals represented part of the proceeds of the sale of the house and land, they fell to be taken into account at their full market value, even though they had not been actually realised for cash at the time the accounts were made up. If this latter was the real point on which *Emery's* case turned, then the House of Lords may be expected to take a similar view when *Utting's* case comes before it, since in both cases—as between the builders, as vendors and the purchasers—there had been completed transactions of sale, the consideration for which was a cash sum plus an annual payment, readily marketable for a lump sum, in the one case in perpetuity and in the other only for 99 years. The difference in period is not, it is submitted, a real distinction vitiating the principle laid down in *Emery's* case.

The Courts recently have been much occupied with the change made by the Finance Act, 1926, in the doctrine of succession for the purposes of the Income Tax (*vide* discussion at 2 *M.L.R.* 323). In *United Steel Companies* v. *Cullington*, [1939] 1 K.B. 644, the Court of Appeal considered the effect of the words in Rule XI of the Rules applicable to Cases 1 and 2, Schedule D, Income Tax Act, 1918, as amended by sec. 32, Finance Act, 1926, viz. "the tax payable for all years of assessment by the person succeeding (to a business) shall be computed as if he had set up or commenced the trade, etc., at that time. . . ." In the instant case, the appellant company had been formed to amalgamate the businesses of two steel companies which had been operating with poor results so that they had accumulations of losses and of allowances for wear and tear which they were entitled to set against subsequent profits. It was argued for the new company that it was entitled, as successor to the old companies, to set against *its* profits the accumulated losses and allowances to which the old companies would have been entitled to set against *their* subsequent profits. The Court of Appeal rejected this contention on the ground that, for all purposes of the Income Tax Acts, a successor to a business fell to be treated as though, at the date of acquisition, he had set up or commenced a *new* business; the express words of the section could not be construed to entitle the successor to the benefit of allowances due to the person carrying on the *old* business. *Scottish Shire Lines Ltd.* v. *Lethem* (1912), 49 Sc.L.R. 792, which was a decision to the exact contrary, was distinguished on the ground that it was decided upon the provisions of the Income Tax Act, 1842,

reproduced, it is true, in the Income Tax Act, 1918, by which the successor to a business was assessed upon the average profits of his predecessor, so that the new concern, being charged on these profits, was entitled to the predecessor's unused allowances; the Finance Act, 1926, had, however, repealed these provisions so that cases decided upon them could furnish no precedent in construing the new legislation.

A. FARNSWORTH.

REVIEWS

WORKMEN'S COMPENSATION. By SIR ARNOLD WILSON, M.P., and PROFESSOR HERMANN LEVY. Vol. I: Social and Political Development. pp. xxi and 328 (with Index). Oxford University Press. **10s.** net.

This is the third volume in a series by the present authors evidently designed to give a detailed descriptive and critical survey of a number of social institutions which particularly affect the lives of what are called "the working classes." Of these their valuable work on Industrial Insurance has already been reviewed in this journal (see *M.L.R.*, Vol. II, p. 76). The introductory remarks to that critique are generally speaking applicable to the present work which again explores the borderland territory between law, economics, politics and sociology. Once more the authors leave us considerably in their debt for the valuable flood of light which they throw upon a very important subject. They do not attain quite so high a standard as in the earlier volume, a deterioration which appears to be due to overhastiness. This is evident from a certain lack of balance, from a number of repetitions, and from the insufficient character of the comparative treatment of the subject which is pretty well confined to Germany with occasional references to the U.S.A. Recent developments in some other countries, such as Canada, would certainly have been apposite to the argument. Nevertheless as a survey of the development of the system in this country this book is absolutely indispensable to every serious student of the subject.

From some points of view the first chapter on Accidents and Common Law is the most significant for in it the authors, one of whom it will be remembered is a Conservative Member of Parliament, demonstrate with complete impartiality and absolutely up to the hilt how the judges, under the new conditions produced by the Industrial Revolution, failed to adapt the rules of the Common Law so as to protect the working people. They sum up the position admirably in the following statement, "at a moment when workmen most needed the protection of the Common Law it was interpreted by the courts against them through the imposition of three limitations arising from the doctrines on principles of: (1) Common Employment, (2) *volenti non fit injuria*, and (3) Contributory Negligence." Though there are some slight historical errors, and at least one error in Latinity (*tuo . . . laedet*, . . . Sir Arnold!) in this chapter it gives an excellent survey of the developments in the law which as has been made abundantly clear by numerous authors actually modified the Common Law in the interests of the employing class. The law of contract, and those parts of the law of tort which were concerned with the protection of property proved on the other hand much more susceptible of expansion.

In the succeeding chapters the authors trace the attempt to modify the doctrine of common employment by means of the Employers Liability Act, the appearance of the first Workmen's Compensation Act, 1897, the early realisation of how defective this was, and its tardy improvement in 1906 and again in 1923. In the earlier part of this narrative the authors fail to hold the balance evenly between the Liberals and the Conservatives, and Sir Arnold Wilson is perhaps seen flying his political colours. However meagre, the earlier reforms in fact came from the Liberals, and while Joseph Chamberlain is clearly entitled to the credit of introducing

the Compensation Act he did so rather in the guise of a Radical than as a Conservative and very much in spite of rather than with the encouragement of his new political allies. The truth is that the whole development has been secured in the face either of active hostility or grudging acquiescence from the employing class who have feared that every concession would add to the costs of production. This is proved again and again in the present volume from the mouths of their own spokesmen. But while this outlook, though shortsighted, is perhaps natural, it is difficult to condone the complaisant attitude of the official and legal members of the various commissions which from time to time have investigated the workings of the statutes. Neither do the Trade Union representatives appear ever to have taken a line in favour of anything more than a tinkering with an unsatisfactory system. The general impression could not be better summarised than in the words of the authors when commenting on the Report of the Inter-Departmental Commission of 1904 whose labours led to the Act of 1906: "No reader of the Report can avoid the impression that the Committee as a whole was less concerned with the interests of the workmen than with those of the employer."

The whole development shows up the less favourable side of the English method of muddling on. A system of employers' liability was bound to lead to a widespread adoption of insurance. It would have been sensible to provide for a scheme of national insurance in the first instance as was shortly afterwards done in connection with the nation's health. Having established a vested interest in the insurance of workmen's risks the legislature has not had the courage to break it down, though at one time this wasteful system absorbed some sixty per cent of the premium income in expenses and profits, and still takes forty, though it is clear that a nationally organised business could be run at no more than ten per cent of the premiums.

Further, the legislature, or its bureaucratic advisers, have shirked the administrative difficulties attached to making insurance compulsory, so that many a workman's prospects of compensation depend on the solvency of his employer. Again although the Home Office takes a vague interest in the subject there is no system of control or supervision other than sporadic enquiries by occasional commissioners or committees. One of the few far-reaching proposals of the Holman Gregory Committee of 1919, that of establishing a whole time commission has been steadily ignored.

Since the actual administration of the system is in the hands of privately owned insurance companies the real interests of the injured workman receive no consideration; the whole object of the insurer being to escape from his liability at the least possible cost. This has led to the widespread use of lump sum settlements, an evil which has been perfectly well known to everybody concerned for the last forty years, but no adequate steps have ever been taken to cure it. Perhaps the most deplorable result of this system is that it provides no incentive towards, or machinery for, prevention. Among the really valuable features of the present volume are the emphasis which it lays on this point, and the evidence which is produced from Germany to prove what could be done in this direction. Point is added to this by Appendix I, which certainly merits attention. It contains a fairly detailed description of the more important contracting out schemes, and makes it clear that it is possible to provide rather better benefits than those laid down in the Act, with a more humane and sensible administration, and a real attention to prevention of accidents, under

private schemes which do not appear to involve any greater financial outlay.

We await with interest the authors' proposals for reform, though their shadow is clearly cast before by the present volume.

R. S. T. CHORLEY.

THE BRITISH CONSTITUTION. By H. R. G. GREAVES, *Lecturer in Political Science at the London School of Economics and Political Science.* London: George Allen & Unwin, 1938. 296 pp. **7s. 6d.**

If Jennings' *The Law and the Constitution* turns out to be to this age what Dicey's *Law of the Constitution* was to its predecessor, this work may prove to be the *Bagehot* of the present time. There is little similarity in style or in sentiment: Mr. Greaves is less pellucid, and not at all snug. But he is more careful of fact than Bagehot was, and his book, unlike almost all modern work on its subject, bears at every point the impress of a humane but relentlessly retained and self-consistent view. The point of view is a common-sense democratic point of view, and in consequence it is clear that the author supports His Majesty's Opposition rather than His Majesty's Ministers at the present time. But the book is in no sense a party essay, and notably avoids that habit of 30 per cent exaggeration which spoils so much of the writing, if not the thought, of Professor Laski, to whom it is dedicated.

The book is planned to deal first with the legal, then with the social, institutions which govern our form of government. It deals successively with Parliament, the Crown, the Cabinet, the parties, the administration, the armed forces, the administration of justice, the church, the educational system, public opinion, and English democracy in general. Lawyers will cavil at a few such points, such as the statement, on p. 79, that "Since the Statute of Westminster . . . it has become a principle of the Commonwealth that no change in the royal style *or position* shall occur without the agreement of all the Dominions. The royal style and titles, and the succession to the Throne, are thus protected, but the Dominions are free to take away legal and conventional powers and ceremonial position to any extent they like from the monarch upon whose identity and formal titles they are thus bound to agree."

But there is a good deal for which the lawyer will have to thank Mr. Greaves, and not least for his treatment of constitutional convention. Dicey did a great service when he discovered convention as a class of rules forming part of the constitution. Jennings did a further service when he pointed out that some conventions, notably those of British Commonwealth relations, approximated in precision of statement to rules of law, but a disservice when he argued from the fact that the position between law and convention is hard to draw, that the distinction between them is only of secondary importance except for the professional lawyer. Mr. Greaves now corrects that false emphasis by showing how far domestic British convention is simply the subjunctive sense of political propriety of the dominant upper middle class, not formalised and digestified into an intelligible abstract system of rules, and nearer therefore in its nature to fact than to law. This reviewer, at any rate, is grateful to Mr. Greaves for making him appreciate the full urgency, in the interests of democracy, of Mr. Justice Evatt's plea for the translation of the more vital conventions into law.

R. T. E. LATHAM.

THE PRINCIPLES OF ENGLISH LAW AND THE CONSTITUTION. By O. Hood Phillips, M.A., B.C.L. (Oxon), *Barrister-at-Law, Reader in English Law in the University of London.* Sweet & Maxwell, 1939. 558 pp. **21s.** net.

This book covers a rather wider field than its title might seem to indicate. Different parts of it may be used, as the author explains in the Preface, by students of Jurisprudence, of Constitutional Law and of the subject sometimes called the English Legal System. No doubt there may have been room for additional textbooks in these various subjects, but it may perhaps be doubted whether it was wise to have, in effect, combined two or three books in this one volume. The result is inevitably that the learned author has had to compress his material and the severely concentrated result is at times slightly indigestible. This is particularly unfortunate as the author, when he allows himself room, has a happy faculty for giving interesting and lucid explanations, enlivened here and there by a pleasant humour.

The first two chapters are both entitled "Law and the State," and they are designed to give the student an introduction to the necessary background of political theory. Chapter I contains summaries of the main theories of law and of the state. Chapter II contains, *inter alia*, an interesting section on the relation between constitutional law and administrative law, including a brief statement of Dr. Jennings' criticism of Maitland's views. It concludes with a statement of Dicey's theory of the Rule of Law and a criticism of that statement. These brief outlines of various theories, of which the first two chapters mainly consist, are very fair and form convenient summaries for one who has some acquaintance with the originals, but it seems doubtful whether a student without previous knowledge of the subject would be able to profit much from reading such highly condensed statements.

After these two introductory chapters, Part I of the book proper is devoted to a short description of the English legal system and of the elements of English law.

Perhaps the most important part of the book is Part II, on the Constitution of the United Kingdom. This part contains a great deal of material, and the author deserves congratulation upon his success in explaining the law and custom of the constitution at once succinctly and accurately. He does not limit himself to a bare statement of the law, but finds time for various discussions of a more general nature, including for example an admirable discussion of the extent to which members of Parliament are bound by a "mandate" from their constituents. He might perhaps have usefully included a reference to the views held on this subject by Burke who wrote to his constituents in Bristol: "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."

A few points of detail struck the present reviewer as meriting criticism. On page 228 it is stated that the King makes the Accession Declaration at the meeting of the Accession Council. In fact the Declaration is made before Parliament on the first occasion when a new king opens Parliament, or at the coronation, whichever event occurs first; Edward VIII made the Declaration before Parliament on 3rd November, 1936 (see H. L. Debates, 5th series, vol. 103, col. 1), and George VI made it at his coronation. On page 238 appears the statement that "it is a cardinal

rule of British constitutional law that no action can be brought against the King." The word "British" here should be "English" because of course in Scotland the subject can bring an action as of right against the King, through the Lord Advocate, for breach of contract. The same criticism applies to the first sentence on page 311. It is not clear why the functions of the Home Office relating to, e.g. administering the Factory Acts should be dealt with (on page 349) in Chapter X entitled "The Chief Functions of the Executive," while the duties of the Ministry of Health and other similar departments are considered separately in Chapter XII under the heading "The Chief Functions of the Administration." Some rearrangement of these chapters might improve the book in the later editions which will no doubt be called for.

Part III explains the constitution of the British Empire, so far as it is capable of explanation, and contains much interesting material, including an excellent description of the Crown's position as the symbol of Empire unity. There is an explanation of the orthodox British view, exemplified by the decision in *Williams* v. *Howarth*, which is contrasted with the South African view of the divisibility of the Crown.

This is a valuable book which will no doubt be of great assistance to students, for whom it is primarily intended, but it would have better deserved the publisher's description, "readable and interesting," if it had not attempted to cover quite such a wide field in a limited space.

W. I. R. FRASER.

IMPOSSIBILITY OF PERFORMANCE IN CONTRACT. By R. GOTTSCHALK. Stevens & Sons, London, 1938. iv + 141 pp. **7s. 6d.**

This book is an interesting attempt to analyse the law relating to supervening impossibility of performance in contract. The author gives a useful account of the historical development of the doctrine by English decisions, and then proceeds to examine the question in the light of general principles, with special reference to Roman law. The work concludes with some American criticisms of the English rules, and there is a short appendix stating the position in certain foreign legal systems. This wide use of comparative material provides interesting reading, but unfortunately results in a certain lack of clarity and precision. The greatest difficulties which have to be faced in a study of supervening impossibility are the initial problems of limiting the field of investigation and defining essential conceptions. The question of frustration has been the subject of much controversy, and at different times has been confused with fundamental mistake, failure of consideration, repudiation on breach, initial impossibility or illegality and even the tortious conceptions of negligence, inevitable accident and Act of God, while rules of equity have also had some influence on the various decisions. The author would have given the reader a clearer idea of the position had he introduced his subject by a general discussion of the relationship of the doctrine of supervening impossibility to other branches of the law of contract, and to the law of tort, equity and quasi-contract, before proceeding to a detailed analysis of the cases. While he has considered the English doctrine in its relation to other systems, he has failed to assign to that doctrine its place in English law.

In spite of this, however, the author has succeeded in presenting a wealth of useful and interesting material, especially in the course of his discussion of the Roman law of *casus*, which provides an admirable basis

for the consideration of the general principles underlying the doctrine of frustration. He has also emphasised the inconsistencies of the position in England, and in particular has pointed out the defects of the doctrine of implied conditions. On the one hand if the Court is to attribute to the parties a purely fictitious intention to discharge the contract, an intention which in fact they never possessed, why should not the Court go further, and attribute to them an intention to distribute the loss in an equitable manner? On the other hand, the doctrine of implied conditions provides no guide as to the nature of the impossibility which operates to discharge the contract. This is becoming increasingly evident in those cases in which the parties foresaw or could have foreseen the event which caused the impossibility, but did not provide for it in the contract. Frustration should not, logically, depend on the fiction of the implied intention of the parties, but on the happening of an event, on the occurrence of which the law intervenes automatically to put the contract at an end, in accordance with clearly defined principles.

These, and other criticisms of the English rules, make this little work an interesting and readable book. K. JAFFÉ.

MEET THE PRISONER. By JOHN A. F. WATSON, *Honorary Secretary of the National Association of Prison Visitors, 1928–38, Chairman of the Southwark Juvenile Court.* With an Introduction by SIR ROLLO GRAHAM-CAMPBELL, *Chief Magistrate of the Police Courts of the Metropolis.* Jonathan Cape, London, 1939. 303 pp. **8s. 6d.** net.

It affords a great pleasure to review a book that is written with so profound a knowledge of the subject and so much genuine ardour, coupled with a real mastery of the art of writing. The author approaches his task with a twofold qualification, being the Chairman of a London Juvenile Court and a former Honorary Secretary of the National Association of Prison Visitors. It is particularly this latter capacity that dominates his attitude towards the prison problem and enables him to add a note of special interest to the existing literature on English Penology. After the memoirs of ex-prisoners and books of former prison or police officials and of experts with a more or less casual connection with the modern prison system, we are now presented with the first systematic report of a lay magistrate with a regular and first-hand experience of prison conditions extending over a period of fifteen years.

In the first part of his work the author gives a vivid sketch of the development of the English prison system, and even in this often told story he has succeeded in discovering some interesting new facts and persons, as for instance Sarah Martin, one of the most remarkable successors of Elizabeth Fry. There follows a well-informed survey of present-day prison conditions, excluding the Borstal system to which the book makes only occasional references. As already indicated, the author lays particular emphasis on the progress brought about through the efforts of prison visitors, prison teachers, and other voluntary workers, and it is indeed one of the greatest merits of prison administration in this country to have given theoretical recognition as well as practical assistance to the idea that in this field perhaps more than anywhere else the work of reclamation carried out by the State must find its supplement in the voluntary collaboration of private citizens. Whilst this is by now almost a commonplace, the problem as to exactly how far the State can safely rely on such volun-

tary contributions has not yet been entirely solved. Nor has it been generally settled which and what professional qualifications may be necessary for voluntary workers in this field. This might especially be said with reference to Education in prison and After-care for the discharged prisoner—subjects to which some of the most valuable chapters of this book are devoted. In spite of his fully justifiable admiration of the work of many After-care Organisations and of the help given by individual employers, the system itself with its lack of uniformity and co-operation arouses the author's criticism. His conclusion in this respect is "Reform it altogether" by building up a "National Association of After-care" on the model of the Borstal Association, with two distinct departments for young and adult offenders respectively (p. 206). There can hardly be any doubt that the future development will move in this direction. The transfer of the functions of the Prison Commission to the Home Secretary —as proposed by the Criminal Justice Bill—may be the first step towards the creation of a single department for the care and after-care of all delinquents, irrespective of the particular method of treatment they happen to be undergoing (see p. 233).

The author adds a brief summary of the Criminal Justice Bill, as far as it concerns the prison system, and some Appendices which will be particularly welcome to all social workers.

Under the headings "Financial Disability of Ex-Prisoners" and "Civil Disabilities of Ex-Prisoners," the legal position of persons sentenced to imprisonment with regard to Unemployment Insurance and Assistance, Poor Law Relief, National Health Insurance, Pensions, Emigration, etc., receives systematic treatment.

The book fully deserves the recommendation of the Book Society.

HERMANN MANNHEIM.

THE RESIDENCE AND DOMICIL OF CORPORATIONS. By A. FARNSWORTH, Ph.D., LL.M., with a Foreword by LORD MACMILLAN. Butterworth & Co., London, 1939. 370 pp. **21s.**

It has been apparent for a long time that the conflict of laws relating to corporations is one of those many subjects of private international law which stand in dire need of a comprehensive and systematic treatment. The subject has been intensively dealt with in decisions and research works in the United States as well as on the Continent where many opportunities have arisen of discussing problems which have not yet come up for judicial decision in this country. For this reason, perhaps, they have so far escaped the attention of English writers. It is, therefore, a very valuable contribution to a work yet to be written that Dr. Farnsworth has devoted an exhaustive treatise to two questions, viz. the residence and domicil of corporations.

The learned author had already published a preliminary study (1935, 51 *L. Q. R.* 684 *sqq.*) demonstrating that there is an essential difference between the domicil and the residence of a corporation and that it is the latter that English Courts, in Revenue cases, have almost exclusively been concerned with. The author has now enlarged on the subject. After three introductory chapters dealing with the residence and the domicil of individuals and the nature, etc., of corporations he sets out to explain the residence of a corporation in connection with income tax, commercial

"domicil," jurisdiction and the *situs* of debts. In the last chapter, which is probably the most interesting, he analyses the problem of the domicil of a corporation while the six appendices treat such subjects as the residence of the individual in American law, the nationality of a corporation at common law, the basis of jurisdiction over foreign corporations, the "Carrying on of business" by a foreign corporation, etc.

It is sufficient to indicate these headings to show that Lord Macmillan is fully justified when he says in his Foreword that the author "has adventured into a territory which, if not *terra incognita*, may at least be said to have been hitherto very imperfectly mapped," and one cannot but agree with his further remark that this is "an admirable monograph" and that "nowhere else is the whole learning on the subject to be found so exhaustively set out and so critically analysed." This is particularly so as the author has collected much valuable American and also some Continental material.

Where the subject is most unexplored and where, therefore, the authors' observations will be particularly appreciated is in connection with the question of the domicil of a corporation. He holds the view that it is not the law of nationality, but the law of the domicil which determines the corporation's status and capacity. The law of the domicil of origin is the law of the country where the corporation is incorporated and though it might theoretically be possible for a corporation to acquire a domicil of choice, yet the law cannot recognise it, since the status and personality of a corporation must always depend on the law by which its constitution and character is framed. The place where central control and management is exercised determines the residence, but not the domicil, of the corporation.

But, it may respectfully be asked, is this reasoning not a little too theoretical? It is probably agreed on all sides that a corporation's status is always determined by the *lex incorporationis*. Whether this is described as the law of nationality or the law of domicil does not really matter. The only point where it becomes important to discuss the corporation's domicil is in connection with the rule of the law of income tax according to which a person resident in England, but domiciled abroad need not pay tax upon income arising abroad but not remitted to this country. In the author's view a French company whose central control is exercised in England and which, therefore, resides here, is exempted from paying tax on such income since its domicil (of origin) is, and must always be, in France. It may be thought by some that when it becomes necessary to decide in this single connection where a corporation is domiciled, not a question of principle, but a question of construction of the Income Tax Act, 1918, is involved. Notwithstanding the author's well justified insistence on the distinction between residence and domicil, might it not be permissible and necessary to hold that in that provision the word "domiciled," if applied to corporations, merely refers to that place which, both as regards *factum* and *animus*, comes nearest to the individual's permanent home, i.e. to the place where central control is exercised?

Since the book was written, the problem of the domicil and residence of corporations has acquired fresh prominence owing to the Trading with the Enemy Act, 1939, and the Defence (Finance) Regulations Amendment Order, 1939 (S.R.O., 1939, No. 1067), relating to exchange restrictions. There can be no doubt that Dr. Farnsworth's book will also prove very useful for the purpose of construing certain provisions of these enactments.

F. A. MANN.

THE LAW OF INLAND TRANSPORT. By OTTO KAHN-FREUND. London: Stevens and Sons, Ltd., 1939. xxiii + 424 pp. **12s. 6d.** net.

This is a new edition of a well-known text-book, Disney's *Law of Carriage by Railway*. Like his predecessor, Mr. Kahn-Freund has written an introduction to the law of inland transport admirably suited to the needs of those who wish to know something of this body of law, but who do not propose to specialise in it.

New methods of transport have grown up and important changes have been made in the law governing carriers. Much that has become obsolete in Disney's original work has been left out, and sections have been added on topics which have arisen since. The layman should be grateful to Mr. Kahn-Freund for undertaking this work, for he is a lucid and interesting guide through what otherwise might be impassable territory. The student of law will read this book as a preliminary study only; but a text-book of this kind must very often be all the instruction in this field which can be given to the student of transport or of commerce. He will get from it what he wants most—a comprehensive outline of the legal framework within which the transport business operates to-day.

The law of carriage was originally applied to the carriers who preceded the railway. Important changes were made in the legal rights and duties of carriers as the law was adapted to fit the situation created by the growth of large railway companies, changes which culminated finally in the Railways Act of 1921. The reader is shown the changes in the status of railway companies as carriers which were brought about by the Standard Terms and Conditions of Carriage, published in 1928. This process of change continues, as the small competitive road carrier invades the monopoly of the railway companies. The layman will learn that the obligations of the new carriers by road to their customers, and their privileges as carriers, are not yet decided. The student of commerce should be interested in the progress which is being made towards complete definition of the legal status of the motor haulier. Road hauliers, it appears, are neither statutory carriers like railways nor common carriers like their predecessors, the waggoners. They are usually private carriers. This status may not always be the privileged one, since a road carrier may sometimes gain by showing that he is a common carrier, if for example, the traffic in dispute should consist of valuable goods.

Railway law is treated very fully. The author describes the Acts of Parliament and shows, by citation and explanation of leading cases, how statutory provisions have been interpreted by the courts. After so ample a discussion, it is a disappointment to find that this plan was not followed in the section dealing with the law governing road transport. There we are told only what is in the Acts of Parliament—it would have been interesting and valuable to have an account of the manner in which, for example, the Road and Rail Traffic Act, Part I, has been interpreted by the courts, together with citation and discussion of the more important cases determining in what circumstances carriers' licences shall be issued or withheld.

Mr. Kahn-Freund incorporates chapters on the legal position of the passenger. It will surprise the layman to discover what precautions the prudent traveller should take to ensure that his legal rights remain unimpaired. The reviewer, for one, did not realise that travel was so fraught with opportunities for the conscientious litigant!

GILBERT WALKER.

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INTERNATIONAL LAW AND THE PRESENT WAR

THE fact that all military aggressions of the last few years have started without a declaration of war is a symbol of considerable importance for the diagnosis of the crisis of international law.

In the first place, it indicates, that the rules of warfare, such as they were, are no longer observed by aggressors, and to that category belongs by now a very considerable part of mankind.

It indicates further the disintegration of a society, at least in the relations between aggressor states and others, which feels bound by any common rules of behaviour. But thirdly: the absence of a declaration of war makes it easier to maintain that state of twilight between peace and war which is so characteristic of the present international situation, and which is in itself, a deadly blow to the established international law. For if anything was elementary in the rudimentary international law which had come to be accepted it was the clear-cut distinction between peace and war, and correspondingly between a law of peace and a law of war.

The absence of such a clear distinction blurs the border line not only between peace and war, but also between internal and international revolution.

Italy, Japan, Germany, Russia, all have in different ways described their aggressive actions as police actions taken to deal

with "incidents," or as a process of getting into contact with the people of another country as distinct from their government. It is a natural consequence of this state of affairs that the border lines between belligerency and neutrality are blurred, and the confusion is heightened by the occasional bursts of activity of a fragmentary League of Nations. Thus it would be difficult to say whether at present Soviet Russia is neutral or not in the war between Germany and the Allies. Russia on the one hand, and Great Britain and France on the other, certainly stand on opposite sides in regard to Finland, but have so far avoided direct hostilities. On the other hand, Russia's relations with Germany fit into no known category of neutrality.

These observations may illustrate the revolutionary character of the problems which face the international lawyer. But before discussing these problems in any more detail, it is essential to be clear about the function which the international lawyer might, and should, exercise at the present day.

Throughout the past decade of intensifying international crises the great majority of international lawyers have persisted in an analytical and static interpretation of international law as it was laid down in customs, conventions and decisions, while international society went through revolutionary changes. That this attitude has not increased the efficiency of international law, or the respect for the science of international law, is beyond doubt, but it is less easy to say what should have been done. The chief difficulty is the absence in international society of a clear-cut indication of any change of law. Within the state society a change of law is indicated by legislative act. Sometimes, in revolutionary periods, a radical breach of the existing law initiates a period of lawlessness until a new law-giving authority establishes itself by what German jurists have called the *Normative Kraft des Faktischen*. But in international society there is no organ of legislation, no body of law reformers as distinct from law interpreters.[1] Indeed, as is recognised by Article 38 of the Statute of the Permanent Court, the science of international law has its share in the sources and thus in the making of international law. But it is a fact of considerable sociological importance that through a long period of comparative social stability and a characteristic self-limitation of a legal profession trained in the security of municipal law, interpretation was considered as the overwhelmingly important, if not the only, task. This, of course, never meant that the interpretation of international law was free from political

[1] Possibilities in that direction, inherent in Art. 38, par. 5 of the Statute of the Permanent Court of International Justice, have not been developed.

prejudice. But such prejudices have been inarticulate and presented under the cloak of scientific interpretation, and they have not helped in any way to widen the outlook of international lawyers so as to make them perceive the perpetual inter-dependence of international law on the one hand and the political, social and economic conditions of international society on the other hand. At times of major crisis the task of analytical interpretation recedes to a very subordinate function and the task of following the essential social developments in their effect upon the law becomes all the more important.

It is, of course, a dangerous thing to leave the relative safety of law interpretation and venture into the sphere of law-making: dangerous both because of the lack of certainty and of the temptation to reduce the law to a mere department of politics. But that is due to the rudimentary state of international society and law which has not yet produced any clear separation of powers. While international society is in this state, the international lawyer cannot help being something of a politician, a sociologist, and an economist. The law will be served better by an open acknowledgment of this fact than by the inarticulate intrusion of such non-legal spheres into the law. The task then is to steer between an international law, which is nothing but political pamphleteering, clothed in technical legal expressions, as in Nazi Germany to-day,[2] and the surfeit of analytical interpretation in which international lawyers in non-totalitarian countries have so much indulged.

How is it possible to distinguish a breach of law from a change in the law, produced by a process corresponding to a legislative repeal in municipal law? This question is strangely unexplored, beyond the general knowledge that a fundamental and radical breach of the existing law when successfully imposed upon a society becomes a source of new law. Now in international society, composed as it is of a limited number of state units and characterised by a wide space of no-man's land, with a limited sphere of international legal relations, there is often a long and uncertain period of transition between the eclipse of one rule of law and the formation of a new one. Not only is it difficult to say at what point a rule of international law, especially a customary one, has ceased to be valid, but it is even more difficult to say when a new practice has hardened into law. Between these two stages lie many transitory ones when an old practice, once universal law, but gradually

[2] A characteristic example is Bockhoff's *Völkerrecht Gegen Bolschevismus* published in 1937 at the height of the anti-Bolshevist campaign, and now banned in Germany as an obstacle in the relations between Germany and Russia.

abandoned by a large part of international society, fades away and a new practice has not yet spread sufficiently or become definite enough to crystallise into a rule of law.[3] Hence the activity of an international lawyer must be so much more tentative, discretionary, destructive, and creative than that of his colleague who applies a municipal system. Thus it is now universally recognised that a large proportion of the Hague Conventions of 1907 is in fact no longer applied. Those who like to avoid the essential problems may prefer to base the inapplicability upon the absence of ratification of the conventions by some small State (as was done in the last war) or upon the general participation clause which forms part of so many of the Hague Conventions. But the essential problem is surely when and why a Convention ceases to be valid in the absence of such facts. Where a rule is essentially declaratory of existing custom it becomes obsolete with the obsolescence of the custom. Where the rule is created by a law-making treaty, the legal formula to express its obsolescence is probably the *clausula rebus sic stantibus*.[4] Both formulae make it essential to examine when a change of political, social and economic conditions has attained such a degree that it is no longer possible to operate the rule: in fact, the notorious *clausula* can fulfil in this connection a much more useful and honest task than that which it has usually fulfilled, by providing a cloak for the unilateral denunciation of treaties by a party which no longer wishes to be bound by them.

Laws of Warfare

Are there still any laws of warfare? The essence of these rules is restraint in the conduct of war, but it is essential to distinguish between two objects of such laws. One object is the imposition of certain rules of humanity upon an otherwise unbridled violence between the belligerents. Another is the limitation of the scope of warfare, mainly by a distinction between a military and a non-military sphere. The humanisation of war is still possible where it does not interfere with the effective pursuit of the war, and depends merely upon a residue of civilisation and moral restraint in matters like the treatment of captured or wounded enemies. The distinction between military and non-military spheres on the other hand is dependent upon the character and scope of modern war and therefore upon political, social and economic factors

[3] Friedmann, *British Year Book of International Law*, 1938, pp. 118 *et seq.*; Keeton and Schwarzenberger, *Making International Law Work*, p. 189.

[4] Professor McNair in *Law of Treaties*, p. 393, speaks of "desuetude" in regard to bilateral treaties which have ceased to be observed.

which we cannot unmake by a stroke of the pen, and which are bound to affect the law. This is the explanation why so far, at least, there is not much evidence of a wholesale violation of the Geneva Conventions whereas the rules of warfare laid down in the Hague Conventions are so very largely disregarded. In many rules, of course, a certain view of the border line between military and non-military spheres coincides with humanitarian considerations. Wherever that is the case it can safely be said that the modern needs of warfare usually prevail over humanitarian motives.[5]

If we apply these general principles to the position of the laws of warfare in the present war, there is no reason to doubt at all the continued effectiveness of the Geneva Conventions; whereas the majority of the Hague Conventions relating to the conduct of war seem to have fallen a victim to the totalitarian character of warfare. The purpose of war, namely the breaking of the enemy's resistance, is now as much a matter of interfering with the enemy's supplies, production, transport, morale, as it is a matter of military victory. The life of the individual has become part of the political and military effort, and commerce has become a part of politics. This latter fact in particular has obliterated many rules of warfare and of neutrality.

It would, of course, be destructive of any rule of law, if every change in conditions could be adduced as an excuse for a breach of law, and, indeed, a breach of law could be denied on this ground. If Germany to-day bombs civilians, sinks merchant ships at sight, or the Americans claim a neutrality zone of 300 miles, other powers are perfectly entitled to speak of a breach of law and to act accordingly. But the international lawyer should not be content with that. He should distinguish those breaches which arise from sheer contempt for restraint and the rule of law in international relations, from those which are the expression of permanent social and economic changes and therefore likely to be repeated until the old rule has fallen into desuetude through general non-observance. He should then further examine whether the breach of a particular rule prepares the making of a new and different rule, or just a state of lawlessness in which there is neither the restraint nor the general observance which develops a new rule of law. The stopping of all enemy trade, including enemy exports to neutral countries, is a case in point. Until the time appears ripe to state openly that the old rule of contraband has fallen into desuetude, belligerent powers will operate with the

[5] Cf. Smith, *Développement moderne des lois de la guerre maritime* (*Extrait du Recueil des Cours*) 1939, pp. 6 *et seq.*

elastic notion of reprisal to justify this necessary concomitant of modern war.

Finally, an observation on the background of the rul[illegible] on land and on sea, should precede a discussion of the[illegible] in the present war. The object of the war on land is[illegible] powering of the enemy, his army, his government, hi[illegible] Modern technique of war, and the destructive power[illegible] arms will encourage the disregard of the rules of [illegible] bodied in the Hague Conventions. The only motiv[illegible] will be the fear of retaliation, and, to a limited exte[illegible], to conserve the resources of a conquered enemy. The latter consideration will hardly operate in relation to a major enemy. Whoever takes the offensive, is likely and almost bound to violate the existing rules, and thus justify reprisals; the reluctance to do so may be one contributing factor to the stalemate in the West.

The position at sea is very different. In most maritime wars, certainly in the last one and the present one, one side has the mastery of the seas, which the other side seeks to destroy. The object of the side in command of the seas is to secure its own communications and commerce, while stopping that of the enemy. As it has been well put, it seeks to destroy property rather than life.[6] It will thus tend to ignore those rules which impose restraint upon the pursuit of the economic war, but not the rules which protect life. The other side, on the other hand, while also pursuing totalitarian economic war, mainly by pressure on neutrals within reach of its armies, will attack the power in command of the sea by all possible means such as unrestricted mine and submarine warfare which threatens life as well as property. Where the laws of sea warfare are essentially suited to the requirements of a power in command of the sea, as is the case with the present law, the more odious kind of unlawful behaviour, the breach of the rules safeguarding life, will therefore come from the power which attacks the command of the sea. There is not the same temptation for the other side, and it is a definite tactical advantage for this side—the Allies in the present as in the last war—that the law supports their type of warfare at sea. But the need for the enemy—Germany—to break that law is so pressing that an observance of the laws of sea warfare by both sides is almost out of the question, and it becomes one of the issues of war, whether the Allies can successfully defend their command of the sea, and with it the existing law, or Germany can successfully defy and destroy both.

(*a*) On land only the Polish war, and lately the Finnish war

[6] H. A. Smith, *Développement moderne des lois de la guerre maritime*, p. 19.

illustrate so far the disregard of most of the customary distinctions between military and non-military objects by totalitarian aggressor states. Where force was sufficiently overwhelming on the attacking side, and ruthlessness seemed likely to achieve the defeat of the enemy country, it was applied. Open towns were bombarded, civilians massacred, property confiscated or destroyed.[7] Where it was not done, the motive was not respect for the law but equality of strength and the fear of retaliation. It may be safely predicted that any major land offensive will be accompanied by similar radical breaches of the Hague rules.

(*b*) At sea the last war brought the elimination, for all practical purposes, of the distinction between contraband and non-contraband, between military and public property of the enemy on one hand, and private enemy-property on the other hand, between military objects and commercial interests. They all came to be considered as part of one political organism, and to participate in the war fully. The present war started where the last one ended, and it would be futile to discuss again what is now commonly known. The abortive Declaration of London, never ratified, was soon abandoned in the last war. No one has since attempted to revive it. But the second Hague Convention, equally violated in the last war, still is law on paper. So is the Declaration of Paris of 1856. Three facts, of different legal importance, seem to stand out, in the sea war, as hitherto conducted—

1. The seizure of enemy-goods on neutral ships by all belligerents, contrary to the Declaration of Paris and regardless of the question whether the enemy-goods are of private or public origin.[8]

2. Unrestricted laying of floating and unanchored mines by Germany, contrary to Convention VIII of 1907.

3. Sinking at sight of enemy merchant-ships (2) by German submarines, contrary to the Treaty of 1930 and the Protocol of 1936 signed by Germany.

For the present position of international law these different violations of established principles are not of equal significance. The first, the comprehensive destruction of enemy commerce, illustrates an economic evolution which is universal, dictated by modern conditions of warfare and the grip of the state on economic life, and in the light of which it is becoming useless to speak of a violation of law. The old law is in process of becoming inoperative

[7] On the different rules of the Hague Conventions thus violated, cf. Oppenheim-Lauterpacht, *International Law*, Vol. II, Chapter III.

[8] Prof. Smith, *loc. cit.*, p. 30, attempts to save the Declaration of Paris by declaring illegal the seizure of "truly private" enemy goods. From those he excludes all goods of which the enemy state controls import and export, price and distribution. No belligerent has attempted to follow this quite impracticable distinction.

through common practice based on a fundamental change of conditions, and the effect is the cessation of a custom or the tacit rescission of a treaty, whichever one prefers.

The laying, by belligerents, of anchored automatic contact mines which break away is not a clear breach of a definite rule of law, although certainly of a rule of morality, because of the notorious clause in Art. 3 of Convention VIII of the Hague Convention, which makes the duty to warn the enemy government of floating mines subject to what the other party considers as "military necessity."[8a]

This is a typical example of spurious law-making by international treaty between irreconcilable conflicting interests[9]; it serves to emphasise the necessity of common interests and values as the basis of law, and of authority and sanction to make law a reality. On the other hand, the sowing of floating mines is a clear breach of Convention XIII. But neither Germany nor France are bound by Art. 2 Convention XIII, which makes it unlawful to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.

Unrestricted submarine warfare, on the other hand, is a clear breach of law by Germany, in defiance of an unambiguous obligation undertaken by the present regime, and its open breach serves to illustrate the point made above as well as the depth of the cleavage and of a conflict in which it is made clear that there is no community of values to impose restraint between Nazi Germany and her principal enemy.

(*c*) There is no law of air warfare, but there have been many notable attempts to suggest rules. The essential purpose of these attempts has been to introduce restraint into this most modern and most destructive of all weapons, on land by a re-definition of military objectives and the outlawing of attacks against non-military objectives, at sea by an adaptation of the rules of sea warfare to the nature of air warfare, in such a way that aeroplanes would serve as auxiliaries to warships and be subject to the same rules in regard to non-combatants.[10] So far the function of aeroplanes in sea warfare has been much more limited than anticipated, owing to military reasons. What evidence there is, gives little ground for hoping that the suggested rules might establish themselves. Germany, at any rate, does not seem inclined to observe any more restraint in the conduct of air warfare than in

[8a] Similar vagueness makes the provisions on searching of neutral mails in Convention XI rather useless; cf. Smith, *loc cit.*, p. 12/13.

[9] Cf. Smith, *loc. cit.*, p. 52.

[10] Hague Committee, 1923, Spaight, *Air Power and War Rights*, Second Edition 1933; Smith, *British Year Book of International Law*, 1936, 37–44.

that of submarine warfare. The Allies have had no opportunity to use aircraft against German sea commerce. Again it might be pointed out that the suggested co-operation of airplanes with surface craft presupposes the existence of a substantial surface fleet with which they can co-operate.

One thing is certain: that the same factors which tend towards ruthlessness and lawlessness in the war on land and at sea, operate also in regard to the use of aircraft.

Reprisals

In the last war the appearance of a common law between the belligerents was preserved throughout, and that made it necessary on both sides to resort to reprisals in the drive towards lawlessness. In the present war the community of civilisation and law is at least doubtful. On the German side it is totalitarian in ideology as much as in the conduct of operations. Many utterances of Nazi leaders openly declare and indeed exalt the absence of common values with the arch-enemy. But the tendencies are conflicting, and the pseudo-legal notion of reprisal therefore still exercises its dubious function. It is characteristic of a society which has not overcome the stage of self-help, but pays lip service to the rule of law. Whenever a specific justification fails, reprisal is brought in as a sort of general clause of justification for acts which would otherwise be illegal.[11] The limitations expressed by the requisites of necessity and proportionality introduce an element of restraint; but as for necessity, it is as elastic here as is "military necessity" in Hague Conventions, and proportionality is difficult to measure when measures and counter measures have for their object the strangling of the life of a great nation.[12] Apart from that, here as in other matters, the parties are judges in their own cause. The

[11] Smith, *Guerre maritime*, p. 51.

[12] The stopping of exports of German origin, decreed by the Allies as a reprisal for Germany's unrestricted submarine and mine warfare, creates a difficult legal problem, in so far as it gravely affects the rights of neutrals. The justification put forward for this interference is similar to that put forward in the last war (cf. *The Stigstaad*, [1919] A.C. 279 and *The Leonora*, [1919] A.C. 974, that the interference is not graver and, indeed, less grave than that caused by the German measures which provoked them, and that neutrals, by suffering the latter, have committed a wrong which is being repaired by the reprisals. Cf. R. Y. Jennings, "Union," in *New Commonwealth Institute Digest*, No. I, January, 1940. On the basis of the existing law this argument is sound but it can be safely predicted that in every major war enemy exports will be stopped, and the action of reprisal covers a process of legal evolution.

Another argument is advanced by Professor H. A. Smith, *loc. cit.*, p. 25, who suggests that the rules of the Declaration of Paris are based on treaty and a fundamental violation by one party releases the other from its obligation. This argument seems to overlook, first, that the Declaration of Paris has developed into general customary law, and second that, in a multilateral treaty, the contractual relations between two parties cannot affect the position of third parties.

very elasticity of the notion of reprisal makes its use also desirable as a substitute for an ordered process of international legislation which would register fundamental changes in social conditions. Thus the interference with enemy exports to neutrals, not covered by any traditional definition of contraband, but plainly a principal and necessary weapon in economic warfare, can in terms of customary law only be justified in the name of reprisal. The whole conception of reprisal, like European society at present, stands on the borderline between a society which has not yet progressed to a real rule of law, but feels bound by a certain community of principles and interests, and complete lawlessness prevailing between warring factions not thus held together.

International Law shows us clearly that the respect for law may rest on three possible foundations—

1. Where it is firmly established, a law-giving authority establishes the law and the sanction for its enforcement. This stage International Law has not yet reached.

2. Where authority is absent, an equilibrium between conflicting interests, with roughly equal power, can support a law of less stability and strength but nevertheless real. This is the position of the customary law of neutrality.

3. Where either of the two aforementioned guarantees is absent, common observance based on community of cultural and moral standards alone protects habits to which many deny the force of law. This is the position of the laws of warfare, and the disintegration of these common standards has largely taken away their basis, badly shattered by the pressure of modern social conditions, and the development of totalitarian war in particular.

Law of Neutrality

The present threat to the law of neutrality therefore bites deeper into the structure of International Law than the eclipse of the rules of warfare. The existence of an equilibrium between conflicting interests has given reality to the law of neutrality for several hundred years. It is the disappearance of that equilibrium which has threatened the law of neutrality, in different ways, ever since the outbreak of the last war. The problem of neutrality shows more poignantly than any other branch of International Law the dependence of legal rules on the existence of certain political, social and economic conditions.

1. In a twofold way the law of neutrality is based on a balance of power.[13] A certain balance of power must exist in the relations

[13] Cf. Morgenthau, *Kansas City Law Review*, 1939, pp. 112 *et seq.*

between the belligerent groups themselves. as well as in the relations between the belligerents and the neutrals. In all major wars there is likely to be sufficient balance of power between the belligerent sides to make the possible addition of a neutral to the enemy side, through violation of his neutrality, a grave matter. But against that may be held the hope of a powerful belligerent to overwhelm a neutral before he can join the enemy or receive assistance, and thus to upset the balance of power in relation to the enemy. Against this threat neutral states have two defences: geographical isolation or military strength, which may be increased by collective neutral action.[14] Where all these factors are absent, in the opinion of one of the belligerents, neutrality is in danger, as was the case with Belgium and Greece in the last war, and is the case with practically all European neutral nations, except Italy and Spain, in the present war.

2. The condition of neutrality is gravely threatened where war assumes a predominantly economic character, unless both sides are essentially independent of economic relations with other countries not at war. Since war to-day must aim at the destruction of the enemy's economic resources, his sources of supply, production and consumption, it must tend to draw other countries in, unless the enemy is completely self-sufficient. No conceivable belligerent is, at present, in that position. The preeminence of economic warfare is a further inducement to risk the violation of neutrality.

3. The present law of neutrality, as laid down in the Declaration of Paris, the Hague Conventions, and the unratified Declaration of London, is directly dependent upon a specific division of the spheres of politics and economics, the former being a public and the latter being a private concern, the former within and the latter without the rights and duties of neutral states.[15] Now that distinction has become increasingly precarious, and indeed senseless, owing to social developments which make most of the law quite inapplicable.[16]

4. As the League Covenant attempted, although with reservations, to destroy the isolation of wars through a general duty to intervene in wars outlawed by the League Covenant, so the crusading character of the present war which is one of ideologies as much or perhaps more than of nations, will not, in the long run, tolerate neutrality. The missionary character which the

[14] Jessup and Deak, *Neutrality*, Vol. IV. Morgenthan, *loc cit.*

[15] Friedmann, *Fortnightly Review*, 1937, pp. 462 *et seq.*; *British Year Book of International Law*, 1938, pp. 118 *et seq.*; H. A. Smith, *Développement moderne des lois de la guerre maritime*, 1939.

[16] Cf. Friedmann and Smith, *loc. cit.*.

totalitarian states attribute to their political system must consider impartiality, i.e. neutrality as anathema, and it does. But neutrality necessarily depends upon its respect by both sides.[17]

It is the combination of these factors, in the present war, which threatens neutrality in a way it has never been threatened before, except perhaps during the Napoleonic wars, when many of its essential features were not yet developed.

1. As between the belligerents, it is still a dangerous undertaking to violate neutrality and thus to add another enemy. But this consideration may well be overridden any day by the belief that the concentrated power of a modern *Blitzkrieg* launched by a major power may overwhelm a small adjoining neutral, before he has time to organise his defence and receive assistance, while, at the same time, permanent political threats are designed to prevent such neutrals from mobilising in time. Success of such an undertaking would, with one stroke, jeopardize the [illegible] every small neutral state in Europe. But of deeper [illegible] is the change in the position of the United States, the [illegible] onist of the law of neutrality as we know it, and large [illegible] for its development during the nineteenth century [illegible] was gravely threatened when the United States became [illegible] ent in the last war. The balance of power between [illegible] belligerents was then upset. This time the United States is again upsetting the balance, but not by participation. She has abandoned the active neutrality which forced belligerents to respect neutral rights, for a neutrality of abstention, or, rather, of taking no risks. However one may interpret the motives of the latest American neutrality legislation, whether as a strengthening of the tendency to make good business out of other peoples' war, a motive undoubtedly strongly present in the nineteenth century, or as a strengthening of the tendency to keep out of wars, even at the risk of sacrificing business, in one direction the tendency is clear: not to take risks for the defence of neutrality. This purpose both the withdrawal of American shipping from war zones and the "cash and carry" clause serve. If these clauses do not eliminate all risks of complication, as the recent notes protesting against the seizure of German goods destined for the United States, the deviation of American ships from permitted into prohibited zones and the search of American mail show, they do eliminate the chief causes and detach the United States from the defence of the law of neutrality, as developed during the nineteenth century. If the essence of that law was the protection of general international

[17] Friedmann, *Fortnightly Review*, 1940, pp. 24 *et seq.*

trade as a private interest, the United States has for herself abandoned this position, and with it the law of neutrality which is based on it. How far recent American legislation and political action substitutes for this discarded one a new conception of neutrality and international relations, will be discussed below.

2. The last war, with the gradual intensification of economic warfare, brought a series of successive restrictions of the sphere of neutral trade with belligerents. The extension of the notion of contraband, the application and extension of the doctrines of ultimate destination and continuous voyage, unrestricted submarine and mine warfare on the German side, and the long distance blockade coupled with the stopping of German exports, on the allied side, all reduced the position of neutral trade from one where trade was free in principle, subject to restrictions, to one where trade was intercepted in principle, subject to exemptions. Within a few months of the present war this position has been reached again, but a further intensification has taken place, owing to economic trends of the period between the wars. The German war preparation has economically been towards self-sufficiency within greater Germany and the surrounding countries from which it is impossible for any enemy to cut Germany off. On the other hand, Great Britain is more than ever dependent on oversea supplies and her sea trade. In these circumstances the countries which control the sea, but not the space surrounding Germany, must aim at maintaining open at least the ability of small neutral countries to carry on trade with both sides, in other words their ability to remain neutral, even within narrower limits. Their interests thus coincide with the defence of neutrality. Germany, on the other hand, in the case of most of these countries, will be and is inclined to regard the very maintenance of trade with both sides as a decisive strengthening of the enemy, which undoubtedly it is. Neutrality in all these cases[18] must be anathema to her. "He who is not with me is against me."

How far can the lawyer take these changes into account? Even the most conservative of lawyers must admit that the customary distinction between absolute, conditional and non-contraband is now valueless, let alone the artificial and dogmatic distinction attempted but never formally adopted of the Declaration of London. For certain very limited categories of pure luxury articles neutral trade will be tolerated. To do so may, to some extent, placate the neutral concerned, and it may actually do harm to an enemy who chooses to squander his foreign exchange on the

[18] For the difference in the position of the various neutral countries, *cf.* Friedmann, *Fortnightly Review*, Jan., 1940.

import of luxury articles, unsuitable for war purposes. There are not many such articles, and it is a matter of taste and temperament whether to maintain the traditional distinction in principle while recognising that in practice the huge majority of goods is now contraband,[19] or to acknowledge that the modern developments of state and society and warfare have abolished the distinction in principle. Here as in other matters the international lawyer may have to state the abandonment of former custom or the tacit repudiation of treaties without being able to detect, during a time of crisis, a new rule. With more confidence can he assert that the doctrines of ultimate voyage and destination have by now been so widely accepted, and over so long a period, that they may be considered as a general rule of law, and the same may be said of the new technique of proof of the contraband character of neutral goods. More important, however, than these single factors, which may well soon be obsolete, is the general tendency towards a reduction of the neutral sphere by the totalitarianism of modern war.

The lawyer can be more definite on the obsolescence of those customary rules of neutrality which presuppose a certain division of spheres between the state and the individual, such as Arts. 6 and 7 of Hague Convention XIII. Here the growing control of the state over economics has made old rules quite clearly inapplicable without there being, as yet, a new rule of equally universal validity. The present author may refer the reader to his former contributions on this subject[20] and to the illustration of this problem offered by the recent Russian note on the Allied blockade. In this note it was contended that Russian merchant ships were immune from search as state ships. The authors of the note may have overlooked that the argument is a two-edged one. If Russian state ships were to enjoy immunity from seizure, Russian trade with belligerents might have to cease, because, being state controlled, it is no longer an unpolitical commercial enterprise, like private business. Either way the argument is superficial. The deeper significance of the point brought out by the note is that the law of neutrality as it stands is based upon a homogeneity of social structure among the nations which is no longer existent. When any one or several states are either privileged or penalised because they have adopted a different social structure the law can no longer function between them and nations of different social structure. Now it is evident that state control over commerce is everywhere in the ascendant as it is clear that commerce and

[19] Thus Smith, *loc. cit.*, pp. 33–34.

[20] *British Year Book of International Law*, 1938, pp. 118 *et seq.* *Mod. L.R.* II, p. 194; *cf.* also Smith, *loc cit.*, 16 and 80 *sqq.*

trade have long ceased to be unpolitical pursuits and are, on the contrary, political weapons of the first magnitude. This operates strongly against the maintenance of neutral trade which is the backbone of the law of neutrality and it is characteristic that the only convinced defenders of that law to-day are those small states whose whole geographical, political and economic situation makes the maintenance of that status a matter of vital importance. A state like Italy is emphatic in stressing its "non-belligerency" as distinct from neutrality. It considers its present impartiality in the war (in so far as it exists) as a temporary expedient, not as a status. Lastly, like all law, the law of neutrality depends upon the existence of a certain moral code which, in its turn is the outcome of a common civilisation. This common civilisation is breaking up[21] and the struggle for the new shape of European life goes deep. No quarter is given while the struggle lasts, and a crusading spirit does not recognise neutrality, because it wants to dominate and, at the same time, impose its own way of life. The precarious balance of powers and interests which created the law of neutrality is thus upset from two opposite sides. Belligerents are driven by political, economic and ideological motives to violate neutrality where they feel strong enough to do so. On the other hand the greatest protagonist of neutrality, the United States, still protected by its geographical position as well as by its power, has given up the active protection of the rights of neutrality, hand in hand with a new outlook on international trade. In such circumstances it becomes more and more difficult to speak of one law of neutrality as binding all members of the family of nations. Instead the society of nations breaks up, for many if not for all purposes, into spheres and groups which may develop new law, and the strongest of these may eventually form the basis of a new general law. Even this, however, is far from being a foregone conclusion since there are many indications that groups of nations may replace the universal society of nations.

The Present Position of the League of Nations

The League has taken one of the most important decisions of its existence by the expulsion of Russia, a measure equalled in importance only by the sanctions decision against Italy. It was done by a concurrence of resolutions taken by the Assembly and the Council. The Covenant does not provide for any formal procedure to state a case of unlawful aggression (as a condition for the imposition of sanctions). When such aggression has taken

[21] Cf. Friedmann, *Modern Law Review*, Vol. II, p. 194; Schwarzenberger in *American Journal of International Law*, Vol. VIII, p. 56 *et seq.*

place, it is for every member to take his measures automatically. This theoretical position was, however, in fact revised, by a number of resolutions, notably the interpretative resolutions of 1921, which left the application of sanctions to the discretion of members and made the measures of individual members in effect dependent upon collective action[22]; they made a formal declaration of a state of aggression highly desirable. The resolution of the Assembly, taken unanimously, but with some abstentions, provided this formal statement as well as the basis for any specific action which the Council was to take under Art. 16. In the matter of sanctions, the Council did not go beyond a general recommendation to members to give assistance to Finland, but it decided upon expulsion of Russia under Art. 16, par. 4. The necessary unanimity was secured with the help of the rule of procedure—revised in 1933—that abstentions would not be counted as votes, and thus the expulsion of Russia is formally valid under the Covenant, while the extent of sanctions to be applied against Russia is left to the discretion of every member, in accordance with the *de facto* revision of Art. 16.[23] Nevertheless, it would be pure formalism to assert that the League Covenant has functioned in the originally provided way. It is possible for one of the paramount objects of the League Covenant, the maintenance of peace through collective security, to be fulfilled without complete universality, as long as membership or active co-operation comprises all those states whose enmity or aloofness might endanger this aim.[24] But it is impossible for this object to be fulfilled, when out of seven Great Powers five are either hostile or aloof. In such a situation, the League can only aim at fulfilling another task, perhaps equally important: to provide, in substitution for the alliance of power politics, a common policy of states based on certain principles of behaviour in international relations, and thus open to the adhesion of any like-minded power, but of no other. To form the nucleus of such a development, the recent resolution of the League was too indefinite, too isolated and too much embedded in the moves and counter-moves of the European conflict. It does, however, contain an element of great and salutary progress, compared with the position of hypocritical impotence to which the League had gradually sunk during the last few years: it acknowledges that a League confined to fewer states, united by similarity of purposes and conduct, is worth more than a universal

[22] The discretionary and collective character of sanctions was formally stated in a declaration by the British Government, before the Sixth Committee of the 1938 Assembly.

[23] Keeton and Schwarzenberger, *loc. cit.*, ch. IX.

[24] *Ibidem*, p. 107.

League which contains aggressors and attacked, active and passive members, which can survive only by abandoning the outlawing of aggression, the imposition of sanctions and altogether any common principles, and which reduces itself, as the League of the last few years did, to a meeting hall of a number of statesmen, who do not meet to make decisions but to communicate decisions made elsewhere.

Is it the purified rump League, from which one can expect a revival of the rule of law in international relations? Not, it is submitted, the League in anything like its present Constitution. For, owing to social and economic developments outlined above, and analysed in detail elsewhere,[25] international collaboration cannot be resumed again by a system of obligations between otherwise sovereign states which leaves homogeneity of political principles, social policy and economic relations aside, but only by a process of international integration, which starts with co-ordination of those essential spheres of social life and ends with a law to secure it. A law of peace, such as the League Covenant and the other peace instruments of recent years attempted, can be effective only in those exceptional periods when the universal reaction against the ruins left by a major war overshadows the looseness of social bonds or actual diversity of interests between the nations. A lasting law of peace, however, must and can only follow from the creation of a social community, as the whole of legal history shows. It is for that reason that the most significant development in the struggle for an international rule of law is not the recent League action, but the series of agreements which co-ordinate the military, political, economic, financial and social life of Great Britain and France. This is not the place to describe and analyse them in detail.[25a] But the mutual interdependence of common political purposes, military strategy, economic production, financial transactions, social policy is becoming more evident every day. When these developments have reached a degree of permanence, the inevitable outcome, more and more acknowledged even by statesmen who can hardly be suspected of excessive enthusiasm for international ideals, will be the subordination of national sovereignty to a common authority, and that permanence will find expression in law.[26] But the lawyer should never forget that the function of law is at the end of social developments, not at the beginning. The law gives form and permanence to social

[25] *British Year Book of International Law*, 1938, pp. 118 *et seq.*; *Modern Law Review*, Vol. II, p. 194; *New Commonwealth Quarterly*, June, 1939.

[25a] For an analysis see *New Commonwealth Quarterly*, March, 1940.

[26] Keeton, "National Sovereignty and International Order," Chap. IX. *New Commonwealth Quarterly*, June, 1939.

principles which have proved their vitality. When the process is reversed, as in the post-war experiments, the law breaks down, as it does, when it persists after the essential social basis has changed.

The significance of Anglo-French collaboration and integration lies in its potentialities. Taken by itself, it cannot secure peace or even a partial international order. But such a development in the relations between the two oldest and greatest national states of Europe is, of course, of wider significance, if it survives the immediate war purposes. And many changes, caused by the war, are likely to survive it.

Declaration of Panama

No less significant is the development marked by the Pan-American Declaration of Panama. First, the claim for a zone of three hundred miles from which belligerent activities are to be excluded, is openly revolutionary, just as the three mile limit and the prohibition of Prize Courts on American territory proclaimed by the United States Government in 1793 were an open challenge to the then governing principles of international law. The latter was successful and played a vital part in the making of the modern law of neutrality. The Monroe doctrine was a further challenge which has not so far been accepted as a rule of international law. The Declaration of Panama constitutes a further challenge to the freedom of the seas, as hitherto understood, and to the law of neutrality. There is, of course, no obligation to accept it. It can even be described as a breach of existing international law. As stated above, a major breach may constitute itself as new law, like every revolution, if it is successful, that is, if it comes to be so universally recognised as to make new custom. For some time to come, this question will remain unanswered, while it is likely that, for reasons of international tactics and distribution of power, the resolution will not be defied.

Beyond this negative aspect, the Declaration of Panama may constitute a further important step in the development of an American society of nations which surrounds itself by a protective wall and, behind that wall, develops a civilisation and a law of its own. This would contribute to the break up of the loosely knit universal family of nations into a number of closely knit families of nations, whose mutual relations are more or less loose. Such a development depends on many factors on which it is idle to speculate at the present moment.

W. FRIEDMANN.

DESERTION AS A MATRIMONIAL OFFENCE

NOW that the Matrimonial Causes Act, 1937, has made desertion without cause a ground for divorce, a new interest attaches to old cases on the subject and already the Courts have been faced with numerous problems connected with the existence, continuance or termination of desertion. As a matrimonial offence desertion is entirely a creature of statute; after the Matrimonial Causes Act, 1857, it was a ground for judicial separation and until the Act of 1925 it was one of the grounds, if of two years' duration and coupled with adultery, on which a wife could obtain a divorce. No statutory definition of the offence exists and, though we have the high authority of Sir Henry Duke (as he then was) for suggesting that an exhaustive definition, wide enough to cover the infinite variety of matrimonial circumstance thrown up in the accidents of litigation, is impossible,[1] the essence of the offence is well known. The *locus classicus* is Lord Penzance's judgment in *Fitzgerald* v. *Fitzgerald*[2]: "No one can 'desert' who does not actively bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides quitting the matrimonial home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute 'desertion.'" Though it has recently been suggested[3] that passages in a later part of this judgment are too wide, the passage quoted above has been accepted as the basis of the law, and, as such, has been explained, amplified and commented on on many occasions.

Thus in *Frowd* v. *Frowd*[4] it was said: "Desertion means the cessation of cohabitation brought about by the act or fault of either party."

In *Jackson* v. *Jackson*[5] Sir Henry Duke said at page 23: "If there is abandonment by one of the spouses of the other, that is desertion. If one of the spouses causes the other to live separate and apart that is desertion."

In *Sickert* v. *Sickert*, Gorell Barnes, J., said[6]: ". . . the party who intends bringing the cohabitation to an end and whose

[1] *Jackson* v. *Jackson*, [1924] P. at p. 24.
[2] (1864), L.R. 1 P. & D. at p. 698.
[3] E.g. *Pulford* v. *Pulford*, [1923] P. at p. 23; *Pardy* v. *Pardy*, [1939] 2 All E.R. at p. 362; *Shaw* v. *Shaw*, [1939] 2 All E.R. at p. 383.
[4] [1904] P. at p. 178.
[5] *Supra.*
[6] [1899] P. at p. 282.

conduct in reality causes its termination, commits the act of desertion."

This passage stresses the element of intention; and this, it is submitted, is really the crux of the matter, for as Hodson, J., has recently said: "Desertion is fundamentally, actual acts apart, a question of intention."[7] Now the Matrimonial Causes Act, 1937, section 2 (*b*), makes desertion without cause for a period of at least three years immediately preceding the presentation of the petition a ground for divorce; and it is submitted the element of intention, stressed in the above passages as essential for the existence of the offence, is the material factor to consider in deciding its continuance or termination, and also in questions of "cause." For the offence is desertion "without cause," and whether the respondent had cause or not must depend on his knowledge of the petitioner's conduct and on his mental reaction thereto; that is, on his intention as formed in all the circumstances. This view is borne out by the way in which the latter passage in Lord Penzance's judgment in *Fitzgerald* v. *Fitzgerald*[8] has recently been undermined; the learned judge said: "But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion,' in my judgment, becomes from that moment impossible to either, at least until their common life and home has been resumed."[9]

In *Pulford* v. *Pulford*[10] the wife was for nearly twenty years an inmate of an asylum, during which time her husband commenced to live with another woman. On the wife's discharge in 1902 cohabitation was not resumed and it was not until 1922 that the wife took any steps against her husband. In that year she applied for a maintenance order on the ground of desertion, and the Divisional Court upheld the justices' order and put the desertion as commencing when the husband ceased to acknowledge her as his wife. The initial separation had not amounted to desertion and the change came when the husband's intention changed. These circumstances do not fit into Lord Penzance's dictum quoted above; yet the Divisional Court had no doubt that they amounted to desertion, which Lord Merrivale described as "not the withdrawal from a place, but from a state of things."[11]

This reasoning was followed in *Papadopoulos* v. *Papadopoulos*[12] where in 1914 the parties had separated under a deed of separation which in 1929 was held to be invalid, and the Court held that

[7] *Lynch* v. *Lynch*, [1939] 2 All E.R. 593.
[8] *Supra*.
[9] At p. 698.
[10] [1923] P. 18.
[11] *Ibid.*, at p. 21.
[12] [1936] P. 108.

it was open to the wife to plead desertion, notwithstanding that they had never lived together after the initial separation under the void agreement. So that, whatever the quality of the separation originally, it was changed into desertion as soon as the husband refused to cohabit in face of the wife's assertion of her rights.

Now it is well settled that the duty of cohabitation is suspended while proceedings are pending between the parties; and therefore the period during which a petition is on the file of the Court cannot be counted in calculating the period of desertion to satisfy the three years' duration required by the Act.[13] For the petitioner has by his own act required the other party to keep away. But where a petition was filed but not served it was held that desertion was not interrupted;[14] for the petitioner, not having put the suit effectively into process, had done no act requiring the respondent to stay away; conjugal obligations continued and the mere filing of a petition did not affect or alter the respondent's intention to stay away; and while that intention continues desertion continues. Again in *Lynch* v. *Lynch*[15] the wife filed a petition for nullity in 1924 but later gave intructions for it to be dismissed, and the parties lived together intermittently until 1933, when the husband refused to see the wife. On presenting a petition for desertion in 1938 it was found that the earlier one had remained on the file; yet Hodson, J., had no difficulty in deciding that desertion began with the husband's refusal in 1933; the mere presence on the file of the old petition was no bar, as it had not in any way affected the intention of the respondent.

Jordan v. *Jordan*[16] makes this line of reasoning abundantly clear. In 1932 the wife left the husband in circumstances that constituted desertion, and in 1934 he petitioned on the ground of adultery, but the petition was dismissed. After its dismissal no active steps to resume cohabitation were taken by either party, yet in 1938 the husband's petition for desertion succeeded, the President (Sir Boyd Merriman) holding that the earlier petition only suspended the desertion, which revived on its dismissal and continued as the respondent's intention to stay away had also continued.

Shaw v. *Shaw*[17] is on a different point, but illustrates, like the above cases, the way in which Lord Penzance's dictum has been eaten away. In that case the parties agreed before marriage not

[13] *Cohen* v. *Cohen* (1939), 55 T.L.R. 707.
[14] *Gibbs-Smith* v. *Gibbs-Smith*, [1939] 1 P. 170.
[15] *Supra*.
[16] [1939] 2 All E.R. 39.
[17] [1939] 2 All E.R. 381.

to cohabit and in fact never did; but it was held that the unreasonable refusal of the husband to begin cohabitation amounted to desertion. All these cases show, it is submitted, the test of the respondent's intention overriding the actual requirement of "resuming a common life and home."

Desertion is a continuing offence and therefore look at the conduct of the parties, not only at the com of the desertion, but during its continuance. Here, submitted, that the continued existence of intention of the guilty party to stay is the crucial element. T a *bona fide* offer to return ends desertion: the intent has *Thomas* v. *Thomas*.[18] Similarly, where a wife deserts her h and is subsequently certified to be insane the desertion an insane person is presumed incapable of forming the intention[19] unless the petitioner can prove that the insane party has in fact the requisite intention.[20] So, also, in cases of "constructive" desertion (where one party has by obnoxious conduct forced the other to quit the matrimonial home) the Courts have emphasised and stressed the element of intention that must accompany such conduct;[21] In *Bowron* v. *Bowron*, after an exhaustive review of the cases on "constructive" desertion, Pollock, M.R., said[22]: "The cases I have referred to . . . clearly indicate that a purpose and intention must be attached to the separation before desertion is proved." Lastly, where one party has deserted the other, such desertion will not be ended by occasional or intermittent visits without any intention to end the desertion and resume cohabitation.[23]

The view that in all instances where desertion is in issue the guilty party's intention is the material factor is, it is submitted, strikingly demonstrated by cases which deal with the circumstances in which a period of separation, initially amounting to desertion, may be deprived of that character. Thus a period of desertion can be ended by an agreement to live apart, and after such an agreement the separation loses its quality of desertion by reason of the change in the parties' intentions.[24] But where the separation agreement was not entered into *bona fide* by the party who, but for the agreement, would be guilty of desertion, the Court can and will go behind it[25] "and regard the real object

[18] [1924] P. 194.
[19] *Jones* v. *Newtown Guardians*, [1920] 3 K.B. 381.
[20] *Bennett* v. *Bennett*, [1939] 2 All E.R. 387.
[21] *Charter* v. *Charter* (1901), 84 L.T. 272.
[22] [1925] P. at p. 193.
[23] *Thurston* v. *Thurston* (1910), 26 T.L.R. 388.
[24] *Piper* v. *Piper*, [1902] P. at p. 202, *per* Gorell Barnes, J.
[25] *Crabb* v. *Crabb* (1868), L.R. 1 P. & D. 601.

lay underneath."[26] By parity of reasoning it has been held ere such a deed is repudiated by the guilty party the initial sertion will revive as the period of separation by mutual consent has ended with the repudiation of the instrument under which it originated.[27] *Watson* v. *Watson*[28] goes further than this but is explicable on the same reasoning. There was desertion and afterwards a "separation" agreement, but from the first the guilty husband failed to make the covenanted payments to the wife. Failure to make such payments does not of itself amount to repudiation[29] and thus revive the desertion. Yet Hodson, J., pronounced a decree on the ground that the separation deed was a "mere incident" in an already existing state of desertion. "The deed was a mere incident"; this can only mean that it did not affect or alter, one way or the other, the guilty party's intention to continue the desertion.

All these are instances where desertion has been found on the test of the guilty party's intention, even though the facts of none of them were within the passage quoted above from Lord Penzance's judgment in *Fitzgerald* v. *Fitzgerald*.[30] The Act, however, requires desertion "without cause,"[31] an expression which is not defined in the statute. The Courts have recently considered two different sets of circumstances in which "cause" for the desertion was raised as a bar to the petitioner.

In *Herod* v. *Herod*[32] the question was whether a petitioner, himself guilty of adultery, was precluded from petitioning on the ground of desertion. Section 4 (ii) of the Act makes the petitioner's adultery during the marriage a discretionary bar without distinguishing the grounds on which relief is sought. Thus on a literal reading of the statute it could be argued that as section 2 (*b*) made desertion a ground for dissolution and section 4 (ii) was in general terms, the offences of desertion and adultery were separate and distinct, and could exist independently of each other.

But it is arguable that the petitioner's adultery is "cause" for the respondent's desertion and the ground of relief is desertion "without cause," such adultery must therefore end the desertion as a matter of law. This view has prevailed in other jurisdictions,[33] where the law is substantially the same as in

[26] *Ibid.*, p. 604.
[27] *Roe* v. *Roe*, [1916] P. 163.
[28] [1938] P. 258.
[29] *Smith* v. *Smith*, [1915] P. at p. 289.
[30] *Supra.*
[31] Matrimonial Causes Act, 1937, s. 2 (*b*).
[32] [1939] P. 11.
[33] Scotland: *Mackenzie* v. *Mackenzie*, [1895] A.C. 384; Australia: *Gilbert* v. *Gilbert*, [1939] S.A.S.R. 79; New Zealand: *Douglas* v. *Douglas*, [1903] N.Z.L.R. 583.

England and in these countries the petitioner's adultery [illegible] absolute bar to divorce for desertion.

In the old statutory jurisdiction a wife petitioner could obta[illegible] a decree on the ground of desertion for two years coupled with adultery; and there are in the books three cases,[34] in which decrees were granted to wives on these grounds, notwithstanding the fact of their own adultery. The argument in these cases turned on the propriety of the Court exercising its discretion in the petitioners' favour; the point that such adultery might as a matter of law terminate desertion was nowhere taken.

It is submitted that either on the strict construction of sections 2 (*b*) and 4 (ii) of the Act or the analogy of the above three cases ample grounds existed for deciding, as the Court did in fact decide, that the respondent's desertion was not *ipso facto* ended by the petitioner's adultery; and the latter was therefore only a discretionary bar. But that was not the way in which the Court dealt with the matter and in the way it was approached it became necessary to examine the nature and essence of desertion, and here the Court seized on the respondent's intention as the vital matter; for, as the learned judge (Merriman, P.) said: "It seems to me to be impossible to hold that adultery of which the deserter is proved to be entirely ignorant, or to which, if it is known, he or she is proved to be entirely indifferent, can have affected his or her intention."[35] This puts the matter clearly upon the ground of the adultery's effect on the respondent's intention and makes desertion depend, not on notional grounds (which the Courts have always avoided)[36] but purely and simply on the respondent's intention to go or stay away, if he has already gone. Where, in forming his design he is manifestly unconcerned with the party's conduct, that party's adultery is neither in law or in fact "cause" for desertion.

Herod's case has been approved and followed by the Court of Appeal in *Earnshaw* v. *Earnshaw*,[37] where the deserting party knew of the other party's adultery but was in no way influenced by it. The Court of Appeal held that mere knowledge was insufficient; it must be knowledge that sensibly affected the party's conduct. This again stresses the element of wilfulness or intention.

Pratt v. *Pratt*[38] is, it must be admitted, at sight first against the view contended for here, that in all questions of desertion the guilty party's intention is the paramount factor. There a

[34] *Symons* v. *Symons*, [1897], P. 197; *Hunter* v. *Hunter*, [1905] P. 217; *Hale* v. *Hale* (1915), 32 T.L.R. 53.
[35] *Herod* v. *Herod*, *supra*, at p. 23.
[36] Cf. *Jackson* v. *Jackson*, *supra*.
[37] [1939] 2 All E.R. 698.
[38] [1939] P. 117.

deserted her husband but later wrote requesting an interview; this the husband curtly refused and the Court of Appeal held that after this refusal she could not be said to desert him "without cause," as he owed "at least a duty to meet her and discuss matters."[39]

The judgment is brief and does not consider the authorities. Hitherto desertion could only be ended in such circumstances as these by a *bona fide* offer to return and the wife's letter by no stretch of the imagination amounted to that. The duties of the spouses are by now fairly clearly settled and "the duty at least to see the other party" is not among them. If either of these explanations be the true ground of the decision it surely goes beyond the authorities. May it not be that a sounder explanation of the case is that the letter indicated some wavering of the respondent's intention to continue the desertion, and the onus of proof is on the petitioner to prove the continuance of that intention, a fact that has been emphasised again and again.[40]

Desertion is, then, as Hodson, J., said in *Lynch* v. *Lynch*,[41] fundamentally a question of intention; and this, it is submitted, is the true test for judging all questions connected with its existence, continuance or termination. It is, as recent cases show, an elastic conception and one which cannot be confined within any precise formula, nor put on purely factual grounds. Easy to describe and difficult to define, desertion is nevertheless simply a question of fact; and in considering this, the reliable test is the test of intention, especially as in these cases the Courts are dealing with intimate relationships into which considerations of reason or logic are not likely to enter. In these circumstances the test must be a subjective one;[42] and that can only rest upon intention.

[39] *Ibid.*, at p. 179.
[40] See *Herod* v. *Herod*, *supra*, and *Jordan* v. *Jordan*, *supra*.
[41] Quoted above.
[42] Cf. *Herod* v. *Herod*, *supra*, at p. 16.

G. A. FORREST.

After the Court of Appeal's decision in *Williams* v. *Williams*[1] Langton, J., in *Rushbrook* v. *Rushbrook*[2] refused to follow *Bennett* v. *Bennett*[3] on the ground that insanity raises an irrebuttable presumption that the insane party is incapable of forming any *animus deserendi*; but Greene, M.R., in *Williams'* case hardly went as far as that: he said[4] . . . "in the case of a person of unsound mind . . . there is, *generally speaking*, no capacity to have the necessary *animus*." However, the Court of Appeal was surely right in holding that one cannot look at the insane party's acts while sane to draw an inference as to what his intention would have been, but for the supervening insanity. *Pratt* v. *Pratt* has been affirmed in the House of Lords,[5] but on the rather wider ground that the wife's conduct showed that during the statutory three years' she had not persisted in her *animus deserendi*.

[1] [1939] 3 All E.R. 825.
[2] 56 T.L.R. 17.
[3] *Supra*.
[4] At p. 828.
[5] [1939] A.C. 417.

EXCHANGE RESTRICTIONS IN ENGLAND

THE restrictions upon dealings in and transfers of gold exchange and certain foreign securities which were introduced in consequence of the outbreak of war, constitute a measure unprecedented in the financial history of this country. Laws against the export of gold and silver, it is true, were on the statute book from the fourteenth century onwards, and the two fairly elaborate Acts of 1663 and 1696 were in force until at the end of the Bank Restriction Period complete freedom of trade in precious metals was restored or, rather, introduced to the modern system.[1] Even during the Great War, 1914–1918, the Government at first confined itself to preventing the export of gold only, and this it did by purely administrative measures which, after the end of the war, were put on a more secure basis by an Order in Council published in the *London Gazette* of 1st April, 1919, and, subsequently, by the Gold and Silver (Export Control, etc.) Act, 1920. As regards American and Canadian and some other securities, at the end of 1915 an appeal was issued to place them at the Government's disposal, and it was not before January, 1917, that the Treasury obtained power to purchase them compulsorily.[2]

In the present war the Government took more immediate and far-reaching steps. The first Order in Council, made in pursuance of s. 1, Emergency Powers (Defence) Act, 1939,[3] and containing the Defence (Finance) Regulations, 1939, in their original form, was dated the 25th August, 1939.[4] It was superseded by the Order of 3rd September,[5] and its present form is laid down in the Defence (Finance) Regulations Amendment (No. 2) Order[6] of 23rd November, 1939, as amended by the Order of the 20th December, 1939.[6a] Further Orders were made by the Treasury, particularly the Currency Restrictions Exemption Orders of which No. 4, dated the 20th December, 1939,[7] is now in force. It is to be regretted that this country seems to have followed the bad example set by so many foreign countries where the regulations were at first rather unsystematical and improvised and where it took years until consolidating regulations put so important a part of the law on a workable basis.

[1] See Mann, *The Legal Aspect of Money*, pp. 52, 53.
[2] See Feavearyear, *The Pound Sterling*, pp. 307, 308; S.R. & O. 1917, No. 47.
[3] 2 & 3 Geo. VI, Ch. 62.
[4] S.R. & O., 1939, No. 950.
[5] S.R. & O., 1939, No. 1067.
[6] S.R. & O., 1939, No. 1620.
[6a] S.R. & O., 1939, No. 1827.
[7] S.R. & O., 1939, No. 1843.

ile in other countries the introduction of exchange restrictions was nearly always tantamount to a stoppage of payments essitated by a smaller or higher degree of insolvency, the efence (Finance) Regulations aim at the mobilisation of foreign investments and a protection of the sterling currency system. The latter point is clearly evidenced by the provision that, with the exception of securities dealt with in section 1, nothing is prohibited which is certified to be necessary for the purpose of performing a contract made before the 3rd September, 1939,[8] and by the fact that, generally speaking, transactions which concern the sterling currency only and are wholly carried out in this country, are hardly affected by the regulations.

Otherwise the Regulations follow well-known lines. Their enforcement is entrusted to the Treasury which have delegated their powers to the Bank of England. All transactions covered by the Regulations require the Treasury's consent without which they are illegal (see the language used throughout: "No person shall except with permission granted by or on behalf of the Treasury . . ."); and the cases decided in connexion with similar provisions would appear to warrant the following conclusions as to the effect of the regulations upon contracts. Contracts made before the 3rd September, 1939 which at that date were still executory, are discharged, if and in so far as the regulations make their performance impossible.[9] A contract made, without permission, subsequent to that date is as a general rule illegal and therefore void, it being immaterial that it might have been performed in a lawful manner if a permission had been given; the mere fact that no permission is in existence at the time when a contract is made renders it illegal.[10] And it seems that by virtue of this principle both the payment, transfer of securities, conveyance of property, etc., and the contract to pay, transfer, convey is avoided. If, however, both parties know of the regulations and are without any "wicked intention,"[11] an implied condition may be read into the contract to the effect that it is made subject to a permit being obtained, one of the parties undertaking to use his best endeavours to secure it.[12]

Contravention of the Regulations involves criminal liability,

[8] S. 3 (2) (*b*); s. 4 (1) (*a*) (ii); s. 5 (3) (*b*) (i).

[9] There is no subsequent impossibility, if a permission is obtained or if securities have to be delivered which have been duly registered and can, therefore, according to the practice established by the Authorities, be freely dealt in by residents.

[10] *In re Mahmoud and Ipahani*, [1921] 2 K.B. 716 (C.A.), particularly at pp. 725, 726 *per* Bankes, L.J.

[11] *Waugh* v. *Morris* (1873), 8 Q.B. 202.

[12] *In re Anglo-Russian Merchant Traders and John Batt & Co. (London)*, [1917] 2 K.B. 679 (C.A.), and see *Brandt & Co.* v. *Morris & Co., ibid.*, p. 784.

and the Treasury and their agents have wide powers to information, inspect books, make searches, and so forth,[1] they have also power to grant exemptions.[14]

As regards the details of the regulations, it is not intended t write a full commentary upon them. It must suffice to indicate their ambit in general and to mark a few salient features. Even on this somewhat narrow basis it will appear that, owing to the time-honoured British dislike of general clauses, the regulations leave many gaps. If the necessity should arise, they will, no doubt, be filled, but for the moment any lawyer who has some experience of similar measures adopted in foreign countries, will learn with satisfaction that, at present, Britain's financial state permits a certain largess. In the meantime it is perhaps not unreasonable to anticipate that certain words used in the Regulations will be construed by the Courts in their commercial rather than their technical sense; e.g. as regards the word "sell" the Courts may perhaps follow *Lambert* v. *Rowe*,[15] where it was held that the word "sell" in section 13 of the Markets and Fairs Clauses Act, 1847, was "not to be construed with reference to the niceties of the law of contract of sale or to the distinction between a sale and an agreement to sell or to the question whether the property in the goods has passed, but is to be understood in a popular sense,"[16] and that, consequently, there was a sale when and where an agreement to sell was made.

1. Section 1 relates to *securities* of any such class as may be specified in a Treasury Order, "being a class of securities which, in the opinion of the Treasury, is likely to be marketable outside the United Kingdom." The Treasury Order of the 26th August, 1939,[17] applies section 1 of the Regulations to securities in respect of which the principal interest or dividends are payable exclusively or, at the holder's election, optionally[18] in the currencies of Argentina, Belgium, Canada, France, Holland and the Dutch East Indies, Norway, Sweden, Switzerland, or the United States of America. A security includes shares, stock, bonds, notes, debentures, debenture stock, Treasury bills, a deposit receipt in respect of the deposit of securities, but does not include a bill of exchange.[19]

The holders of such securities are required to make a return to

[13] Ss. 3 (3), (5); 8; 9 applying Part V of the Defence Regulations, 1939.
[14] S. 4 (1) (*b*); s. 5 (3) (*c*); s. 5 A.
[15] [1914] 1 K.B. 38.
[16] At p. 44, *per* Ridley, J.
[17] *London Gazette*, No. 34659, 25th August, 1939.
[18] Securities which provide merely for an option of place are therefore not affected by the regulations. As to the distinction between option of place and option of payment see Mann, *loc. cit.*, pp. 147 *sqq.*
[19] Ss. 10, 1 (8).

ank of England[20]; the Treasury may transfer them to themes "at a price . . . which, in the opinion of the Treasury, is t less than the market value," and where this is done the curities "shall forthwith vest in the Treasury free from any mortgage pledge or charge,"[21] there being elaborate provision as to the registration of the transfer, etc.[22] Moreover, a sale or transfer or any act "which involves the creation of a charge on," including a mortgage or pledge of securities belonging to the specified class requires the Treasury's permission.[23]

These restrictions do not apply "if the Treasury are satisfied that at all times since the beginning of the 26th August, 1939, all the persons interested in the security, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge or charge created before the said day, but including any persons beneficially interested therein under a trust, were not resident in the United Kingdom." It would seem, therefore, that every case where, owing to the beneficial owner not residing in this country, exemption is claimed, must be submitted to the Treasury or, in practice to the Bank of England to satisfy them that the securities are beneficially owned by a non-resident. This machinery, vesting unfettered discretion in the Treasury, will exclude many doubts and difficulties which would necessarily arise, if the individual had to decide for himself whether there is no person beneficially interested in the security resident in this country, but, on the other hand, it is bound to cause disappointment to many genuinely non-resident holders who will often be reluctant not only to specify their holdings, but also to disclose their identity to the authorities.

In many cases it will be difficult to decide whether a person is resident here or not, but the cases decided under the Income Tax Acts will afford a useful guide.[24] As at present drafted the regulations also apply to persons who have a residence not only in this country but also abroad. In many cases this will create a hardship which is perhaps not really intended. Moreover, the position of persons who cease to reside in this country is in no way subject to special provisions so that the regulations would appear to apply to them even after they have given up their residence here.

If it appears that any person beneficially interested in the securities resides here the duty of making a return rests upon the "owner," i.e. any person, "who has power to sell or transfer the

[20] S. 1 (1) (*b*).
[21] S. 1 (3) (*a*).
[22] S. 1 (3) (*b*), (4), (5).
[23] S. 1 (1) (*a*).
[24] See Farnsworth, *The Residence and Domicil of Corporations*, pp. 1 *sqq.*, 74 *sqq.*

security or who has the custody thereof or who receives, wh on his own behalf or on behalf of any other person, dividend interest thereon or who has any other interest therein."[25]

Apart from the duty to register the securities and from th Treasury's power to obtain a transfer, the restrictions imposed upon the holder of relevant securities are confined to a prohibition to sell, transfer, charge, mortgage or pledge them[25a] or to transfer any security from a register in the United Kingdom to a register outside the United Kingdom[26] although a transfer to a register in any part of H.M. Dominions (excluding Canada, Newfoundland, and Hong Kong), any territory in respect of which the Government in the United Kingdom exercises a Mandate, any British Protectorate, Egypt, the Anglo-Egyptian Sudan and Iraq is allowed.[27]

It will be noticed that as at present drafted, the regulations prohibit only five specified transactions, namely to sell, transfer, charge, mortgage or pledge securities. Unless a very wide meaning is assigned to the word "sell,"[28] many transactions, such as the postponement of the date of maturity or the alteration of the currency are not prohibited.

2. As regards gold, i.e. gold coin and gold bullion,[29] and foreign currency, i.e. the currency of the United States of America, Canada, Belgium, Switzerland, France, Holland, Argentine, Sweden, and Norway,[30] practically identical provisions are laid down in sections 2, 3, 4, and 5. No person, whether resident or not, is allowed to take or send out of the United Kingdom gold or foreign currency[31] (which term in this connexion includes bills of exchange or promissory notes payable otherwise than in sterling,[32] unless they are payable in a currency "issued by the Government of or under the law of" any of the specified countries referred to above, "not being bills or notes which are legal tender in any of those countries"[33]). Only authorised dealers can, in the United Kingdom, buy or borrow gold or foreign exchange from or sell or lend the same to a person not being an authorised dealer.[34]

[25] S. 10.
[25a] S. 1 (1).
[26] S. 3 (1) (*aa*).
[27] Currency Restrictions Exemption (No. 4), Order 1939, S.R. & O., 1939, No. 1667, s. 1 (*b*).
[28] See above note 15.
[29] S. 10.
[30] See *London Gazette*, 4th September and 27th October, 1939.
[31] S. 3 (1) (*a*).
[32] S. 3 (6) (*a*).
[33] See note 27; Currency Restrictions Exemptions Order (No. 4), s. 1 (*a*).
[34] S. 2.

ery person resident in the United Kingdom who is or be-
s entitled to sell or to procure the sale of any gold or foreign
ency is bound to offer it for sale to the Treasury[35] unless the
easury has been satisfied that no person beneficially interested
n the gold or foreign exchange resided in this country on or after
the 3rd September, 1939.[36]

Where this duty to offer exists, but is not complied with, the Treasury may direct that the gold or foreign currency shall vest in them; the effect of such a direction is that the gold or foreign currency for which a price to be determined by the Treasury must be paid, vests in them free from any mortgage, pledge or charge.[37] Where, however, the offer for sale has been duly made, no further obligations would appear to exist, and the Treasury, if they have omitted to accept the offer within a reasonable time so that, according to general principles of the law of contract, it has lapsed,[38] cannot even make a vesting direction; this would mean that, although a sale or loan can only be made by or to an authorised dealer,[39] other transactions, such as the creation of a mortgage, charge or pledge or a trust or an assignment are permissible.

A serious doubt seems to arise with regard to outstanding claims expressed in foreign currency. Section 5 (2) provides that every resident who is "entitled to assign or to procure the assignment of any right to receive outside the United Kingdom and the Isle of Man, in respect of *any credit or balance at a bank* payment of any amount in a foreign currency," must do all things necessary for the purpose of assigning that right to the Treasury. The regulations also provide that exporters must deliver to the proper officer such a declaration as the Commissioner of Customs and Excise may require "with a view to facilitating the enforcement of this regulation and the obtaining of information as to the amounts obtainable in foreign currency (whether a foreign currency to which this regulation applies or not) by reason of the export of goods."[40] The word "credit" in section 5 (2), even if it does not envisage credits "at a bank" only, is obviously far from

[35] Ss. 4 (1), 5 (1).

[36] S. 4 (1) (*a*) (i); s. 5 (3) (*a*).

[37] Ss. 4 (1A), 5 (1A). s. 11 Currency and Bank Notes Act, 1928, which gave the Bank of England power to acquire gold held in excess of £10,000 at the old price of £3 17s. 9d. per ounce of standard gold is suspended by s. 4 (2). As *The Economist* of 2nd December, 1939, p. 339, says, "this bugbear of the gold hoarders thus disappears at the very moment when gold hoarding can no longer be indulged in."

[38] Following the dictum of Mellish, L.J., in *Dickinson* v. *Dodd* (1876), 2 Ch.D. 463, 475, it is generally assumed that an offer lapses by the offeror's death. If this doctrine is sound, which may be doubted, there is nothing which would prevent its application to the offer made under the regulations.

[39] S. 2.

[40] S. 5 (5).

comprising all outstanding claims in foreign currency which through the export of goods, the grant of licences or other Can it then be said that such claims are "foreign currency," any currency other than sterling[41] and that therefore, they a covered by sections 2, 5 (1), so that a sale or loan must be effected through an authorised dealer and a duty to offer is imposed upon whoever is "entitled to sell, or to procure the sale of, any foreign currency"? It may perhaps be argued that the term "foreign currency" as defined by the regulations is sufficiently wide to comprise claims expressed in foreign money and that the regulations attach at least the obligation to offer to the *right*, not to the ability to *procure* a sale. On the other hand, it must be remembered that currency primarily means ready money, that a claim expressed in foreign money may perhaps be validly discharged by the payment of sterling[42] so that no foreign currency ever becomes available and that with regard to a particular type of claims, namely credits or balances at a bank, it has been found necessary expressly to assimilate it to foreign "currency." It is therefore believed that outstanding claims expressed to be payable in "foreign currency" which are not "credits or balances at a bank" need in general not be offered.

However this may be, it is obvious that a creditor of such a debt retains many powers enabling him deeply to encroach upon the rights which, sooner or later, the Treasury can acquire. Subject to the provisions of section 3 (1) (*b*) dealt with below, he can assign it without selling it, he can request the debtor to pay to a third person for the creditor's account, he can release or compromise the debt or agree to the postponement of the date of maturity, etc.

3. In addition to the provisions already referred to and to the prohibition against taking or sending out of the United Kingdom bank notes which are legal tender in the United Kingdom, and postal orders,[43] section 3 (1) (*ab*) and (*b*) contains most elaborate and perhaps unnecessarily complicated provisions which cover transactions relating to both sterling and foreign currency. They read as follows—

> 3 (1) Subject to any exemptions which may be granted by order of the Treasury, no person shall, except with permission granted by or on behalf of the Treasury,
>
> (*ab*) draw, issue or negotiate any bill of exchange or

[41] S. 10.

[42] See *Anderson* v. *Equitable Assurance Society of the United States* (1926), 134, L.T. 557, 562 *per* Bankes, L.J., and the discussion in Mann, *loc. cit.*, pp. 245 *sqq.*

[43] S. 3 (1) (*a*); see s. 10. But there is no such prohibition in respect of bills of exchange or promissory notes expressed in sterling.

promissory note, transfer[44] any securities[45] or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment in the United Kingdom or in the Isle of Man is created or transferred in favour of a person who is resident outside the United Kingdom and the Isle of Man, or make any payment to any such person;

(*b*) draw, issue or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment in the United Kingdom or in the Isle of Man is created or transferred as consideration

(i) for receiving a payment, or acquiring property, outside the United Kingdom and the Isle of Man; or

(ii) for a right (whether actual or contingent) to receive a payment or acquire property, outside the United Kingdom and the Isle of Man;

or make any payment as such consideration.

But the Treasury have made far-reaching exemption orders. Sub-paragraphs (*ab*) and (*b*) do not apply if the person drawing, issuing, or negotiating the bill of exchange or promissory note, transferring the security, acknowledging the debt, or making the payment (hereinafter called the payor, promisor, or transferor) resides outside the United Kingdom or the specified area[46]. And if the payee, promisee, or transferee resides within the specified area, the operation of sub-paragraph (*ab*) is suspended.[47] Whether the parties are resident within or outside the specified area, sub-paragraph (*b*) does not apply if the payment is received or receivable or the property is situated within the specified area;[48] moreover, the payment of proceeds of the sale or redemption of or of dividends or interest on securities beneficially owned by a non-resident is not prevented by sub-paragraph (*ab*).[49]

It is submitted that the essence of these regulations may be conveniently summarised as follows—

No resident is allowed—

(1) to make a payment

(*a*) to a non-resident; or

[44] The expression includes transfer by way of loan or security: s. 3 (6) (*c*).
[45] The expression includes a deposit receipt: s. 3 (6) (*b*).
[46] Currency Restrictions Exemption (No 4), Order 1939, S.R. & O., 1939, No. 1843, s. 2. As to the countries forming the "specified area" see above, note 27.
[47] *Ibid.*, s. 1 (*c*).
[48] *Ibid.*, s. 1 (*a*).
[49] *Ibid.*, s. 3.

(*b*) to a resident as consideration for receiving a ment or acquiring property outside the specified ar for an actual or contingent right thereto;

(2) to draw issue or negotiate any bill of exchange promissory note, transfer any security or acknowledge any debt so that an actual or contingent right to receive a payment in the United Kingdom or in the Isle of Man is created or transferred

(*a*) in favour of a non-resident; or

(*b*) as consideration for receiving a payment or acquiring property outside the specified area or for an actual or contingent right thereto.

It may perhaps be useful to offer some comments on these provisions.

As regards *personal* qualifications, the terms resident and non-resident are employed to denote persons residing within and outside the specified area. If the payor, promisor or transferor is a non-resident the restrictions do not affect the transaction whether the other party is a resident or a non-resident and whatever its nature may be, i.e. whether he makes a payment, draws a cheque, transfers a security, etc., or whether the consideration is received or receivable or situate within or outside the specified area; provided, of course, that the regulations other than section 3 (1) (*ab*) and (*b*) do not apply. On the other hand, if the payor, promisor or transferor is a resident the legality of the transaction depends partly on its nature, partly on the residence of the other party to it; the payment to, and the creation or transfer of a right to receive a payment in favour of a non-resident, is not permitted, but even if the payee, promisee, or transferee is a resident, the contract made in consideration for the receipt of a payment or the acquisition of property outside the specified area is forbidden.

The privileges which thus appear to have been conferred upon the non-resident payor, promisor or transferor are perhaps rather wide, but, on the other hand, it may be doubted whether it is really necessary to restrict the opportunities of a resident so as to preclude him from many transactions with another resident which, very often, are not in conflict with the policy of protecting the nation's reserve of foreign exchange; that A in London who wants to buy for £1000 a Canadian patent belonging to B in Manchester, is prevented from paying the purchase price without permission, cannot be justified otherwise than by somewhat far-fetched arguments.

is noteworthy that there is no machinery which, with rd to section 3 (1), (*ab*) and (*b*), would clarify the question ether a particular person is a resident or a non-resident. In any doubtful cases it will be necessary to obtain a ruling from the Bank of England, but the Courts are not bound by such ruling. A serious difficulty will arise in cases of agency. The resident agent of a non-resident principal probably shares the latter's restrictions as well as his privileges.

As regards the *nature or subject matter* of the transactions comprised by section 3 (1), (*ab*) and (*b*), it will be noticed at once that these regulations only deal with particular cases and therefore leave many others untouched.

1. Where the transaction consists in the making of a payment it is clear that it is illegal if the recipient is a non-resident. But even this apparently simple rule is full of complications. Can, e.g., a resident defendant who is being sued for a sum of money by a non-resident, plead that he is not allowed to pay? If not, are the Courts expected to order a resident defendant to pay money to a non-resident plaintiff, although they know that failing a permission from the Bank of England, the judgment cannot be enforced? If a payment is made "to" a resident, but in favour of a non-resident, there is no illegality; this enables A in London to [illegible] in Birmingham in discharge of a debt of C in New York towards the latter. It may, of course, be that C is under a duty to indemnify A in New York, e.g. by making him a payment there, in which event section 3 (1) (*b*) would render the payment to B illegal; but if C undertakes to pay to A dollars in London[50] six months after the termination of the war, A's payment does not require permission. And if the consideration is neither a payment in New York nor the acquisition of property there nor a right thereto, but, say, the rendering of services in New York, the payment is also permitted, as the consideration is not of the type contemplated by the regulations.

2. Where the resident does not make a payment, but, by drawing, issuing or negotiating a bill of exchange or promissory note, transferring a security or acknowledging a debt,[51] creates or transfers a right to a payment in the United Kingdom or the Isle of Man, the position is different. If such a transaction is made in favour of a non-resident, it requires permission. The question under what circumstances the right is created or transferred "in

[50] If A resides in London the law even presumes this.

[51] There is neither here nor in any other connexion any prohibition of the assignment of a (sterling or foreign currency) debt. This omission may prove costly, particularly as an assignment often renders a set-off possible and thus may bring about a loss of valuable foreign exchange.

favour of" a non-resident, is a serious one. If it should be reg as sufficient that, in a purely commercial sense, the transa favours a non-resident, the provision would involve an imme encroachment upon commercial life, as there are innumerab transactions between residents which can be said to favour non-residents: the acknowledgment of a debt by resident A towards resident B, giving rise to a claim for a commission by a non-resident; the endorsement of a cheque by a resident in favour of a resident limited company which is exclusively controlled by a non-resident; the transfer of shares by a resident to the resident executor of an estate to which mainly non-residents are beneficially entitled—these and many similar transactions would require permission. It is difficult to believe that such was the legislator's intention. It is much more probable that all that was meant was to prevent a non-resident becoming the actual creditor or transferee. The provision would then merely mean that in the absence of permission a non-resident cannot be made the payee of a bill or note, the transferee of a security or the (original) creditor of a debt providing for payment in the United Kingdom.

The transactions envisaged by the regulations are, in general, of so definite a type that only few doubts can arise. It remains however, to be seen whether the term "transfer" of a security will not be given a wider meaning so as to include e.g. the creation of a trust, and it is also noteworthy that the Bank of England has intimated that a transfer of a security in favour of a non-resident will normally be permitted if the security is bought for the full current market price.[51a] Unfortunately it is impossible to give a final answer to the question what transactions are affected by the prohibition to acknowledge a debt. The term has repeatedly been considered in cases decided under the Statute of Limitations and in that connexion it found a liberal construction. If the same interpretation were adopted with regard to the exchange regulations the community would have to use great discretion in phrasing letters to non-resident creditors.

As regards the creation or transfer of a right to payment in the United Kingdom (as defined by the regulations) in consideration for the receipt of a payment or the acquisition of property outside the specified area, the requirements as to the situation of the corresponding performances considerably restrict the scope of the regulations inasmuch as the subsection is inapplicable, if both transactions are performed or performable within or outside the specified area.

[51a] See *The Times*, 5th January, 1940, p. 11.

rtain additional restrictions are made possible by the con-ng sentence of section 3 (1) (*b*) which empowers the Treasury their agents to "impose such restrictions on the making of ayments and the doing of any other acts by *bankers* in the course of their business as appear to the Treasury to be necessary or expedient for the purpose of securing the due enforcement of sub-paragraphs (*ab*) and (*b*)." It in fact appears that certain instructions have been given to bankers; in particular, even before the Order of the 20th December, 1939, it had been laid down that no sterling could be paid to a foreign account at a bank in the United Kingdom unless permission had been obtained from the Treasury or their agents, completion of form E.1 being required for this purpose.

This short examination of the provisions of the Defence (Finance) Regulations thus warrants the conclusion not only that they give rise to many neat problems of law, only some of which could be touched upon here, but also that they do not affect a wide field of matters which in other countries were made the object of close control.[52] But in the course of Great Britain's financial history, the patriotic spirit of the people has indeed proved itself so forceful[53] that the Authorities are fully justified in relying on that irrational factor rather than on the artificial network of stringent regulations.

In conclusion, a few words on the international aspects of the regulations may perhaps be added. As the rights of non-residents are practically unaffected by the regulations and as the latter clearly indicate the policy of allowing the performance of existing commitments, no such repercussions will be experienced in foreign countries as, unfortunately, this country had to suffer from less considerate measures abroad. The fact that this country had to resort to exchange restrictions should therefore afford no justification for English Courts to treat such foreign regulations with still greater indulgence than they have done up till now. Any wishful thought that English Courts might be persuaded *a priori* to refuse any recognition whatsoever to foreign currency restrictions on the ground of a violation of English public policy, will, it is true, have to be abandoned; but already since 1935 there existed no foundation for such an expectation.[54] On the other hand, there is even now no reason to suggest that public policy cannot be

[52] On this point see also *The Economist*, 9th December, 1939, p. 378. As to amendments of the original Canadian Regulations see *ibid.*, 16th December, 1939, p. 416.

[53] See Mann, *loc. cit.*, pp. 73, 111.

[54] See *De Béeche* v. *South American Stores* (*Gath & Chaves*), *Ltd.*, [1935] A.C. 148, and *St. Pierre* v. *Same*, [1937] 3 All E.R. 349.

invoked in particular cases,[55] or that even without a recou
that weapon established principles of law do not sometimes a
the rejection of pleas derived from foreign currency restrictio
There need not be inferred from the Defence (Finance) Regulation
any attempt, for instance, to depart from the wholesome spirit
animating the Court of Appeal's recent decision in *Kleinwort &
Sons* v. *Ungarische Baumwoll Industrie A.G.*[56, 57]

[55] Some such cases are indicated by Mann l. c., pp. 265–268. It has recently been suggested (Cohn, L.Q.R. 55 (1939), 552) that if under a German contract an English debtor owes Reichsmark in Berlin, the German statute preventing the debtor from sending notes to Germany in discharge of his debt, is against public policy; apparently Cohn suggests that the case should be met by the same solution which he propounds in respect of the case in which the Reichsmarks are owed in Berlin under an English contract, i.e. that payment "is impossible as long as exchange control is in force and control authorities have not granted their permission to send in notes of their own country." In view of the fact that it would deprive the Custodian of Enemy Property of a good deal of receipts due to him under s. 1, Trading with the Enemy (Custodian) Order, 1939, this idea, however obvious its fallacy may be, still requires to be exposed. The debtor is under a duty to pay, not to send notes; directly or through the medium of an English bank, he could always procure the notes from a German bank which, on his behalf, would pay them to the creditor. Therefore there never existed an impossibility to pay in German legal tender. That Reichsmark notes could, in general, be paid if the place of payment was outside Germany, seems correct, although Cohn's apparent restriction of this rule to the case where the creditor resides in Germany, lacks justification. Incidentally, Cohn's criticism of *Pyrmont, Ltd.* v. *Schott*, [1939] A.C. 145, is equally unfounded; the decision is merely an illustration of the indubitable principle that if Spanish "pesetas" are owed, the agreement containing no clause as to a particular mode of payment, Spanish law determines which things are legal tender under Spanish law: see Mann *loc. cit.*, pp. 192 *sqq.* and the authorities there collected.

[56] [1939] 2 K.B. 678.

[57] Concluded on 6th January, 1940.

F. A. MANN.

DR. EDWARD JENKS

The death of Dr. Edward Jenks removes a personality who had as wide an influence in the law during his generation as anyone of his contemporaries. In modern times the teacher has come to play as great a part as the judge, or an even greater part, for the judge's decisions are insensibly moulded by the teaching which he received as a student. Dr. Jenks was a great teacher who numbered among his personal pupils both in this country and Australia many who have achieved eminence in the law. By means of his writings, which were marked by an unusual lucidity and breadth of outlook, he reached and influenced a much wider legal public. The *Digest of English Civil Law*, for which he was in the main responsible, has been accepted on the Continent as the most authoritative exposition of English law. By building up a great school of law for articled clerks, as he did at the Law Society's School, of which he was Principal from 1903 to 1924, he ensured that one whole generation of solicitors should be leavened with sound legal scholarship. While by the Solicitors' Act, 1922, which was largely the result of his advocacy, he did his best to ensure that all future generations of solicitors should be educated to at least as high a standard. From 1924, when he might well have retired to a well-merited leisure he devoted six years to helping to build up the Law Faculty in the University of London, where he was the first occupant of the Chair in English Law, to a position of wide influence. Even in the ten years of actual retirement which followed Dr. Jenks continued to wield a prolific pen, and to prove that his mind had not lost its grasp or acuteness. His work did not lack critics, for he had pronounced views over a wide field of law, and held to his opinions with tenacity. But he was a great liberal and always looked forward to progressive developments. His support and commendation of THE MODERN LAW REVIEW has been one of our great encouragements. Finally must be mentioned his founding of the Society of Public Teachers of Law in 1909. Often referred to familiarly as Jenks' Trade Union, this body has undoubtedly done a great work in improving the standard of legal education in England, and has for many years been accepted by the Lord Chancellor's Department as the mouthpiece of the legal teaching profession.

Personally Dr. Jenks did not wear his great qualities on his sleeve, and his rather dry demeanour sometimes alienated people. He was, however, a man of real charm, and passed that great test of character, popularity and friendliness with little children. He was a loyal friend and colleague, and always had a warm welcome for old pupils and for those who had been associated with him in his many activities. This smaller group will mourn not only the passing of a man who in his time rendered great service to the community, but also the loss of a very human friend.

R. S. T. C.

STATUTES

Land Law and the Emergency Legislation

It is not perhaps surprising that with the exception of the Rent Restrictions Acts the emergency legislation of 1914–18 had no direct effect upon the growth of land law. War damage was insignificant and called for no specific change in the law. Requisitioning raised interesting points of constitutional law, but left untouched the general law of land. Very little of the legislation itself was directly concerned with land. The Courts (Emergency Powers) Act, 1914, besides containing the germs of the Rent Acts, merely created a moratorium in those cases where a tenant or mortgagee was unable to pay his debts because of the war, and when this excuse disappeared the Act itself disappeared. The Amendment Act of 1916 contained a useful clause, worthy of consideration to-day, enabling members of the armed forces to determine their leases. Another amendment act of the same year allowed the Court to suspend the operation of the Prescription Act when, by reason of circumstances attributable to the war, a servient owner was unable to build so as to prevent the acquisition of an easement of light. That was all.

From the point of view of land law, the major consequences of the war were not direct, but indirect. They emerged from the social upheavals of the war and post-war periods. Many of them have not yet reached maturity; many, we may be sure, have not yet appeared in the long robe of law. Housing and its problems have made the local authorities some of our biggest landlords, with the attendant but difficult duty of becoming model landlords; and, if legal evolution has any meaning, the standard which they set may well become the standard imposed by law on others. Slum clearance, overcrowding, town and country planning, each of them related to the essential problem of housing, have all emphasised, perhaps for the first time in English land law, the fact that property has duties as well as rights. All these things we owe to the acceleration of legal growth which was begun in 1914.

But they are all indirect consequences of that emergency. None of them, I think, could have been prophesied in 1914, and it would be rash to begin guessing in 1939. That the future emphasis will be on the duties, instead of the rights, of property, is an easy generalisation. Beyond it we step into the darkness of time. The new Rent Act, however, is surely a portent. The original Act of 1915 was purely an emergency measure, intended like all its successors to be temporary; yet its policy outlived the 1925 revolution in the law of real property, and to-day it is still with us, shorn of the obscurities of decontrol and enormously expanded in scope. Here, surely, is something which will outlive the present war. And it is a something of importance, not only to the practitioner but to the legal scientist, for it indicates unmistakeably that the law of landlord and tenant is changing rapidly from the sphere of contract to that of status. Other post-war Acts point the same way; the Housing Acts, the Landlord and Tenant Act of 1927, the Leasehold Property (Repairs) Act, the Agricultural Holdings Acts, all superimpose inescapable terms, all emphasise the status at the expense of the contract. But it was the Rent Acts which first made it possible, even inevitable, to recognise the change for what it is. Already in 1919, Parliament was driven to set out the terms of the new "statutory tenancy." To-day, those terms, varied only by the different

of ascertaining the recoverable rent, are part and parcel of the majority of existing house tenancies.

This new status, it will be observed, is attached to the land, and not to the tenant. Here is no novelty, for away back in the Middle Ages the law of copyholds had already been transferred from the villein to the land which he held. The novelty lies rather in the number and cross-divisions of status—there is the agricultural holding, the working-class house, the controlled house; and one house may for various purposes come within two or more of these groups. The novelty lies also in the statutory source of the status. Copyhold land was governed by custom; it had some of the advantages of the modern principles of control, but, as the agricultural writers of the sixteenth and seventeenth centuries pointed out, the fetters of an unwieldy custom were too heavy, and slowly, as the result of their propaganda, the copyhold gave way to the leasehold. It seems that the wheel has now turned full circle. The contractual lease has played its part, and we are back again in a world of status. But the modern status is parliamentary, not customary; and as statute can change more easily than custom, so the new status is infinitely more flexible than the old.

Another service which the Rent Acts have performed, and will continue to perform, is to illuminate the important post-war developments towards security of tenure. Again other acts have played their part; at times directly, as when a new lease is the only protection for a tenant's goodwill; at times indirectly, when the landlord is faced with the alternative of granting a new lease or paying compensation either for disturbance or for improvements—what I have called elsewhere the "blackmail" principle of your money or your lease. Again it was the Rent Acts which because of their obvious relevancy showed that these other Acts, too, were governed by the same policy. Under the new Act, the very large extension of this policy to something like 95 per cent of the houses in the country has brought for the first time the advantages of security of tenure to the ordinary middle classes. Moreover, the working class house of to-day is not always the slum property of 1914, but something to which a new kind of "goodwill" can conceivably be attached. These are the two new factors which will dominate the future of the Rent Acts. It would be interesting, but idle, to speculate upon their effects.

The only real novelties in the new legislation are the result of the increased likelihood of war damage to property. So far, the government have followed the Weir Commission in postponing the answer to the ultimate problem of replacement and liability, and in consequence the present acts are stop-gap measures intended to avoid decisions rather than to make them. Emergency repairs to essential buildings and to houses which are needed to overcome an actual housing shortage are provided for by the Essential Buildings and Plant (Repairs of War Damage) Act and the Housing (Emergency Powers) Act. Of more general interest is the Landlord and Tenant (War Damage) Act, which now governs the relationship between the landlord and the tenant of property which suffers from war damage. Part I of the Act destroys all contractual or statutory duties to repair, including the landlord's covenant implied by Sect. 2 of the Housing Act, 1936. It applies only to "war damage" as defined by Sect. 24, but the necessary vagueness of the definition creates a real danger lest, after one air raid, every falling ceiling for miles around and for months afterwards should be caught by the Act; the power of the purse will no

doubt make full use of this suggestion as a means of getting ro ordinary Housing Act liability.

Part II seeks to overcome the common law rule of *Redmond* v. *Dai* under which the tenant's contractual liabilities remain despite the t destruction of the real subject-matter of the lease. The short effect of complicated system of notices and counter-notices is this: when seriou damage occurs, the rent ceases to be payable until the property is repaired; if the landlord is prepared to carry out the work, then the lease continues; if not, the tenant may either disclaim the lease or continue it at the price of doing the work himself. This part again applies only to "war damage" and only to war damage which makes the premises "unfit," a barbarity of referential terminology which requires a definition clause for intelligibility and a major war for excuse. Both have been provided. By Sect. 24, "unfit" means "unfit for the purposes for which those buildings . . . were used . . . immediately before the occurrence of the war damage in question." As far as house property is concerned, this sounds like an echo of the "unfit for human habitation" of the Housing Acts, the only difference being that for the purpose of war damage the Court must pay attention to the "standard of accommodation available at the material time, and to all other circumstances." Will the Courts apply to the new definition the comparatively high standard of fitness adopted for the purposes of the Housing Acts? It will not be an easy decision to make, for an unscrupulous landlord may find that these provisions work to his advantage. If a house is "unfit," he can compel the tenant either to accept the impossible burden of repair or to serve a notice disclaiming the lease. What, then, of the Rent Acts? Must such a tenant give up possession to a newcomer who is prepared to pay, not of course an additional rent, but its equivalent in the cost of repair? No doubt a tenant who has served or who is deemed to have served a notice of retention has a reasonable time to carry out the repairs, and may live rent-free the while; but will the Courts consider the tenant's ability to pay in determining what time is "reasonable"? The Act, indeed, gives the impression of hasty draftsmanship, and I look forward with interest to its interpretation and amendment.

Part I of this Act applies to all obligations to repair under any "disposition," and it no doubt affects the usual repairing covenants in a mortgage. A mortgagee is thus placed in suspense with regard to his security in the same way as an owner with regard to his property. The Courts (Emergency Powers) Act and, of course, the Rent Act, also apply to mortgages. Generally speaking, they follow the precedents set up in the last war, and as no doubt they will disappear like their predecessors when the present emergency ends, I do not intend to discuss them. On the other hand, the Possession of Mortgaged Land (Emergency Provisions) Act is new, and introduces a principle which deserves a better fate than its fellows. The mortgagee's normal right to take possession of the mortgaged property is not the result of an express bargain, nor, save perhaps in the case of the charge by way of legal mortgage, is it given by statute. It is the effect of the legal estate, formerly the fee simple, now a long term of years, which by an historical accident is traditionally vested in the mortgagee by the mortgage itself, and in consequence the right arises at once. Of course, few mortgagees exercise the right unless their security is in actual danger, and, when it comes to taking accounts, equity carefully distinguishes between the mortgagee who properly takes possession and his less forbearing fellow. But now that the legislation of 1925 has brought

n sight of a rational system of mortgages, and has given us a practmonstration that a mortgagee does not really require the fiction of l estate, there seems to be no reason why we should not extend the table distinction, and refuse possession to a mortgagee unless either e security or the payment of the debt is in danger. The only sufferers ill be the rogue and the novelist. And now the first step has been taken by the Possession of Mortgaged Land (Emergency Provisions) Act. For reasons which are no doubt capable of explanation, if not of justification, it applies only to mortgages existing at the outbreak of war. But a *prima facie* case has been made out, and it is now up to the "other side," whoever they may be, to show cause why the rule should not be made both absolute and permanent.

A. D. HARGREAVES.

Trading with the Enemy

The Trading with the Enemy Act, 1939, takes the place of a large number of statutes passed, and proclamations made, in the last war. The approach to the problem of preventing trading with the enemy was different in 1914 from what it is to-day. The implications of economic warfare had not been grasped in full, and the first enactments and proclamations made in 1914 look timid and tentative if compared with the wide and drastic powers conferred upon the executive during the later stages of the war. While this fact explains the extraordinarily complicated and partly confused character of the Trading with the Enemy legislation of the last war, there can be no doubt that the new Act also reflects the considerable progress made in general legislative technique since 1914.

The Trading with the Enemy Proclamation No. 2 of September 9, 1914, contained a laborious enumeration of the various Acts and transactions constituting "trading with the enemy." It had to be read in conjunction with an earlier Proclamation of August 5, 1914, concerning Government loans raised by the enemy, and contracts and dealings with the German Government itself, and, in one important respect (insurance) it had to be amended less than a month after its publication (Proclamation of October 8, 1914). This time it has been found possible to sum up the matter by an elastic though sweeping formula. Trading with the enemy is defined as "commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy." The words "for the benefit of" should be noted. A transaction calculated to be beneficial to an enemy is penalized although no enemy may be a party to it. A contract between two persons resident in Britain or between a person resident in this country and the inhabitant of an allied or neutral country may come under the definition, and the same is true of payments made in this country and in allied or neutral territory. The encashment of a coupon on behalf of a neutral "man of straw" is an instance, but not all examples are so obvious. Any less comprehensive definition would have failed to meet the devious measures used by Germany to counteract the effects of the financial and economic blockade. Three examples (partly overlapping) are given, but they are "without prejudice to the generality" of the definition. They concern a variety of commercial transactions calculated to assist the enemy's economic system. But not all of them could, in ordinary language, be described as trading *with* the enemy. Thus, the Act prohibits dealings in goods calculated to benefit the enemy. It is forbidden not only to supply

goods to or obtain goods from an enemy, but a shipment of goo
neutral which may be "for the benefit of an enemy" is covered
prohibition, and a person subject to the criminal jurisdiction of the En
Courts is precluded from trading in or carrying "any goods consigned
or from an enemy, or destined for, or coming from enemy territory." Th
latter clause shows how the ancient common law conception of "tradin
with the enemy" has proved useful in being put to the services of the
modern long distance blockade. The stamp of enemy character is impressed on all goods travelling to and from enemy ports, and all dealings in such goods, for example, their carriage and presumably their insurance has been made a criminal offence, although no enemy is involved in the actual transaction.

Payments and transmissions of money, negotiable instruments and "securities for money" (*a*) to an enemy, (*b*) for the benefit of an enemy, and (*c*) to a place in enemy territory, are the second example given to illustrate the general definition, and a third clause prohibits not only the performance of an obligation to, but also the discharge of an obligation of, an enemy. Again the term "trading with the enemy" is quite inadequate to describe the far-reaching effect of these prohibitions.

A new provision (section 6) includes the purchasing of enemy currency (coins and notes) in the definition of the offence.

The greatest interest attaches, of course, to the definition of the term "enemy." Again the draftsmen were in a position to profit from the painful experiences made by their predecessors a generation ago. Step by step the scope of the proclamations and statutes of the last war had to be enlarged so as to include an increasing number of persons and "bodies of persons" in order to give effect to the legal requirements of economic warfare. It would be tedious and useless to go through the whole of this development[1]), but it should be remembered that the Proclamation of September 9, 1914, went no further than including persons and bodies of persons "resident or carrying on business in the enemy country," and "in the case of incorporated bodies, enemy character" attached "only to those incorporated in an enemy country." It was only by the Trading with the Enemy (Extension of Powers) Act, 1915, passed in the last days of that year, that effective steps were taken to prevent dealings with persons and bodies of persons of "enemy nationality or enemy association" in neutral and allied territory. Further difficulties arose from the fact that persons residing or carrying on business in enemy occupied territory were not included in the original definition (while this time "enemy territory" has been so defined as to include areas occupied by the enemy). It was by the Courts and not by Parliament or the Executive that the test of "enemy control" was introduced in order to determine the enemy character of incorporated bodies.

The definition of an "enemy" in section 2 of the new Act must, first of all, be read in conjunction with section 1 (3) by which "any reference in this section to an enemy shall be construed as including a reference to a person acting on behalf of an enemy." A person may, therefore, be an "enemy" for the purposes of a given transaction though not permanently stigmatized as an "enemy" under section 2. That section itself embodies, in regard to individuals, the common law test of residence in enemy territory, though, surprisingly, not that of "carrying on business," so that a

[1] For a survey of the development, see Scobell Armstrong, *War and Treaty Legislation*, 1914–1922, 2nd Ed., p. 114.

sident in neutral territory and carrying on business in Germany y this fact alone, an enemy. As regards bodies of persons (corporate ncorporate) the Act combines the traditional common law test of orporation or constitution" (used, for example, in English and merican Private International Law) with the control principle evolved n the last war. If a body of persons is controlled by an enemy (who, of course, may himself be a "body of persons") it is an enemy, wherever it is incorporated and wherever it may have its seat or centre of management and wherever it carries on its business. On the other hand, a partnership constituted under German law and a company incorporated in Germany are, by these facts alone, enemies, though they may otherwise have severed all connections with Germany. The test of "carrying on business in enemy territory" has been rejected and so has the Continental view that a corporation derives its nationality not from its incorporation, but from its seat whether this term be construed as implying the *siège social* or the *centre d'exploitation*. A company incorporated in neutral territory and controlled by an individual resident there is not an enemy though it may have its main business activities in Germany. This is, however, innocuous, in view of the wide concept of "trading with the enemy" described above, comprising as it does trading in goods destined for enemy territory and transmission of money to a place in enemy territory.

Moreover, section 2 (2) embodies the principal effect of the Trading with the Enemy (Extension of Powers) Act, 1915, by empowering the Board of Trade to specify persons who shall be deemed to be enemies. Thus, all gaps left by the statutory definition can be closed by executive orders.

The vital distinction between "enemies" and "enemy subjects," already familiar to the legislation of the last war, is again embodied in the Act. An enemy subject is a citizen of an enemy country (not being a British subject), wherever he is resident. In regard to "bodies of persons" the test is "constitution or incorporation" so that every body of persons which is an enemy subject is also an enemy, while as a consequence of the control principle, it may be an enemy without being an enemy subject.

Very wide powers are vested in the Board of Trade to secure the enforcement of the Act. In this respect again the matter was taken up where it had been left at the end of the last war. These powers comprise the inspection of books and documents, the obtaining of information, the entering of premises, and, in the last resort, the appointment of "a supervisor" in order to gain complete control of firms suspected of contravening the Act (section 3).

Other provisions strike at the validity of assignments of choses in action, transfers of negotiable instruments (including coupons and other securities transferable by delivery) made by or on behalf of an enemy, and at transfers of securities (annuities, stock, shares, bonds, debentures or debenture stock) registered in the United Kingdom. In so far as the latter are issued by a company within the Companies Act, 1929, they can no longer be transferred or allotted to an enemy subject without the consent of the Board of Trade. The latter provision would not seem to extend to statutory companies, nor does it apply to bearer securities issued by companies registered under the Companies Act.

In 1914 the desire to prevent payments to enemies inaugurated the first provisions (made under the Trading with the Enemy Amendment Act) by which enemy property in this country was subject to special measures. Their object, however, was also to preserve, "with a view to

arrangements to be made" at the conclusion of peace, "money a[nd] other property belonging to enemies." Strictly speaking, the latter is outside the purview of "preventing trading with the enemy," corresponding measures are again contained in the Trading with Enemy Act. Section 7 of the Act in conjunction with the Trading with t[he] Enemy (Custodian) Order, 1939, provides that money, otherwise payabl[e] to or for the benefit of an enemy, is payable to a custodian (in England the Public Trustee). Property, belonging to an enemy or to an enemy subject can be vested in the custodian by a "Vesting Order" made by the Board of Trade, which has the effect of a Vesting Order made by the High Court under the Trustee Act, 1925.

A large number of questions of detail are bound to arise in the course of the application of the Act, many of which will be governed by the wealth of case law surrounding the legislation of the last war. Some questions suggest themselves even now. One of them concerns the relation between the Act and the common law rule which vitiates contracts involving trading with the enemy. This principle is not expressly embodied in the statute which contains mainly penal sanctions. It will be interesting to see whether the statutory definitions of "trading with the enemy" and of "enemy" will be extended to the application of the common law principle. It may be submitted that, irrespective of the common law rule, every contract in violation of the statute might be held to be illegal on the ground that it contravenes a statutory prohibition. If this view prevails, the common law rule has been superseded for all practical purposes.

The Transfer and Control of Ships and Aeroplanes

There is not a great deal to be said on this subject. As regards ships, action had already been taken before the commencement of the war. The purchase of British merchant vessels for transfer to the German flag which was taking place with some frequency in the earlier part of 1939 began to attract public attention, and as war with Germany became more and more probable strong criticism was directed at the Government for not taking steps to prevent it. The subsequent war on merchant vessels shows that the public instinct has once more been sounder than the judgment of the responsible authorities who were finally forced to take action, and procure the passing of the Ships and Aircraft (Transfer Restrictions) Act, 1939, under which it became unlawful to transfer British ships registered at British ports to a foreign register or indeed to make any transfer or mortgage without the permission of the Board of Trade. With the establishment of the new Ministry of Shipping the like power to issue licences permitting such transfer was conferred upon that department. The penalty for transgression is forfeiture.

The occasion of the passing of the statute was taken to provide for the possibility of similar restrictions upon the transfer of aeroplanes. An order was later issued under the Act putting this restriction into operation and making the sale, transfer or letting on hire of any aircraft unlawful without a permit from the Secretary of State for Air (S.R. & O., 1939, No. 1015). A later order (No. 1587) requires the owner of every aircraft within Great Britain to register his property, and to notify every transfer to the Air Ministry.

It may perhaps be noticed here that very drastic restrictions have been placed upon private and commercial air navigation. For example, no one

September a aeroplane without a licence. Further, the east coast of Great
When s being that which faces the enemy and is most liable to attack, has
£65 c laced so to speak, out of bounds, and no aeroplanes are allowed to
App ere unless belonging to the R.A.F. or licensed by the Ministry. This
pa does not apply north of Perth. Even so, there is clearly some danger of
my 'planes crossing one of the less vulnerable coast lines, and this has
en got over by the establishment of narrow corridors along which
coming aeroplanes must fly and where they can be subjected to scrutiny.
These are seven in number, and the only one on the east coast is to the north-east of Scotland where the Scandinavian route by Stavanger runs. It is further equally necessary that those in charge of planes should observe various conditions as regards markings, etc., which facilitate observation and control by the authorities. The details of these are set out in S.R. & O., 1939, No. 1016. In fact this and Order No. 992 are worthy of perusal for a more detailed idea of the present position as regards the flying of aircraft.

It may be recalled that in 1938 a licensing system for commercial air transport, whether of goods or passengers, had been established under an order of that year (Licensing of Public Transport Order, 1938). This has been revoked, but the various licences issued under it were not cancelled (S.R. & O., 1939, No. 1588).

It is perhaps hardly necessary to add that another Order (No. 1014) gives to the executive power to requisition aerodromes, and aircraft, plant, and machinery found at such aerodromes. It is curious that the framers of this order were so unusually modest in their requirements.

We may observe that shipping has been subjected to a control only less complete. The Admiralty has naturally become the authority as regards navigational directions, and a series of orders deals with such matters as darkening ships (S.R. & O., 1939, No. 1155), lights (No. 1156), routes (No. 1157), the use of wireless telegraphy (No. 1158), and pilotage (No. 1162). The Shipping Department of the Board of Trade had important duties conferred upon it which are now apparently shared with and in practice exercised by the Ministry of Shipping. Here the principal problems are (*a*) making the most economical use of the available tonnage, and (*b*) the securing of the most advantageous priorities in connection with such matters as shipbuilding and repairs. These matters are dealt with in S.R. & O., 1939, No. 1090, under which no British ship is to proceed to sea without a licence, and Nos. 1086 and 1087, under which licences are required for ship repairs or for ship construction. No. 1065 may also be referred to. It introduces a scheme of compensation for seamen whose effects have been destroyed or damaged by operations of war.

R. S. T. C.

Official Secrets Act, 1939

The Sandys Case and the various other incidents during 1937–9 which have been referred to from time to time in this review resulted in a modification of the Official Secrets Act, 1920, which has a certain importance, for it reduces to some extent the much criticised powers of any police officer not below the rank of an inspector to require any person to disclose any information in his power relating to an offence or suspected offence under the statute. It was under this section (section 6) that Mr. Sandys, M.P., was threatened by the Attorney-General. By section 1 of the Amending

Act recently passed (2 & 3 Geo. VI, c. 121) the permission of a Secretary of State to such interrogation must first be obtained, unless in an urgent case where a chief officer of police may exercise his discretion if he feels he must interrogate at once, but must report his action to a Secretary of State forthwith. It will be observed that even in this case the discretion is entrusted only to a chief officer of police, which means an officer of the rank of chief constable.

It may be noted that while section 6 of the Act of 1920 also conferred the power of interrogation upon a member of His Majesty's forces engaged on guard, sentry, patrol, or similar duty, the new section does not extend to such categories. There is no evidence that section 6 was ever used by soldiers, but the power is obviously a dangerous one, and much more likely to be exercised during time of war than peace, so this amendment is also significant. It must be added, however, that Regulation 80A of the Defence Regulations confers ill-defined but apparently wider powers of interrogation upon persons acting on behalf of a Secretary of State or the Admiralty whenever such person "considers it necessary or expedient in the interests of public safety." During the period of the war, therefore, the executive has taken back with both hands what under Parliamentary pressure it yielded with one.

R. S. T. C.

NOTES OF CASES

...ciple of Precedent

Nelson v. *Cookson*, [1940] 1 K.B. 100, is a decision which deserves notice for two reasons. The defendants, who were medical officers at a county council hospital, were sued for negligent performance of an operation and pleaded the Public Authorities Protection Act. It was argued for the plaintiff that since they were not servants of the hospital authority so as to bring the doctrine of *respondeat superior* into play (*Hillyer* v. *Governors of St. Bartholemew's Hospital*, [1909] 2 K.B. 820), they must be independent contractors who are unable to claim the benefit of the Act (*Tilling, Ltd.* v. *Dick Kerr & Co.*, [1905] 1 K.B. 562). Atkinson, J., thought this an interesting argument to which he might have been disposed to attach some weight had it not been for two previous decisions to the contrary by which he thought himself bound. It is clear from the judgment of the majority of the Court of Appeal in *Wardell* v. *Kent C.C.*, [1938] 2 K.B. 768, that the common law classification into servants and independent contractors is not necessarily exhaustive where the interpretation of a statute is concerned, and we respectfully agree with the learned judge who is reported in [1939] 4 All E.R. 30, at p. 34, as saying: "It seems to me really almost an absurdity to ask me to regard the defendants as independent contractors. They are not; they are officers of a public body performing a public duty imposed upon the county council, a duty which can only be performed through and by individuals."

The second, and more interesting, point concerns the nature of the authority by which the learned judge held himself bound. In two previous cases, one a decision of the Court of Appeal and the other a considered judgment of McCardie, J., it had been conceded by the plaintiff and assumed by the Court without argument that medical officers in the position of the defendants were within the protection of the statute. Whether these cases created precedents which had to be followed in the instant case is a matter on which there is little authority. The older view is summed up in *Viner's Abridgment, tit.* Precedents (A) 2, in which it is said that "precedents which pass without challenge of the party or debate of the Justices are not regarded as law." This statement was modified or explained by Parker, C.J., in *Reg.* v. *Bewdley* (1712), 1 P.Wms., at p. 223, where he remarked: "It is a rule, indeed, that precedents *sub silentio* are of little or no authority: but that is to be understood of cases where there are judicial ... to the contrary." The Chief Justice is here limiting the application ... maxim to situations which arise not infrequently when a court assum... ...int of law in ignorance of the fact that it has previously been decided the other way after argument. A modern example of this can be found in *Fisher* v. *Oldham Corporation*, [1930] 2 K.B. 364, in which McCardie, J., refused to follow a line of decisions based on the assumption that a police officer is the servant of the corporation which engages and pays him, in which older authorities to the contrary were not discussed or even cited. But the question in the instant case concerned the importance to be attached to an assumption about the interpretation of a statute when no conflicting judicial view had been expressed. Such an assumption must be of a persuasive and not a binding nature, and its weight must vary with its reasonableness and the length of time during which it has passed unchallenged. If the assumption is obviously wrong,

as was the case in *Cookney* v. *Anderson* (1863), 1 De G. J. & S. 365. Lord Westbury assumed that the statutory provisions governing the before him were contained in Acts of 1830 and 1832, in ignorance of fact that those Acts had been amended in 1840, the assumption will not followed, even by an inferior court (*Drummond* v. *Drummond* (1866 L.R. 2 Eq. 335, *affirmed* L.R. 2 Ch. App. 32). If it is not obviously wrong, a judge is free to accept or disregard it, and the decision will depend on whether satisfactory arguments can be adduced *ex post facto* in its support. But if it has stood unquestioned for some years, a judge will be loath to overrule it even if he personally thinks it wrong, and his attitude will gradually harden into one of unqualified acceptance if there continues to be no challenge. The situation is exactly comparable to that which arises when a superior court is faced with a point on which there is a consistent line of authority in the lower courts (*Bourne* v. *Kean*, [1919] A.C. 815: *Re Carrington*, [1932] 1 Ch. 1). This was the view taken by Atkinson, J., in the present case, for he said ([1939] 4 All E.R., at p. 33): "I quite agree that the matter has not been argued and made the point of a decision. It is still open to be dealt with, but when one finds that for quite a long time a certain rule has been accepted as law, it would take a great deal to convince one that it was wrong." The opening words of this quotation down to "open to be dealt with" do not appear in the *Law Reports* or in the version in 56 T.L.R. 2, but this omission affects the clarity and not the force of the argument.

From the nature of the case, any challenge to prevent time running in favour of the assumption cannot come from the Bench, for then there would be a conflict of judicial opinion, and the remarks of Parker, C.J., quoted above, would apply. Acceptance or non-acceptance, therefore, could be proved only by reference to the opinion of the profession as reflected in textbooks and articles. Some confirmation of the attitude of Atkinson, J., can be found in *A.-G.* v. *Hancock*, [1940] 1 All E.R. 32, where Wrottesley, J., in deciding that the Courts Emergency Powers Act, 1939, did not bind the Crown, thought it "not unimportant and not entirely irrelevant" that an Irish Court had assumed that the similar statute passed in 1914 did not apply to the Crown and that no person had previously come forward "either in respect of the Courts Emergency Powers Act, 1914, during its pendency, or under the present Act," to maintain the contrary. The less forceful language used by the latter judge can be explained on two grounds, firstly, that Irish decisions are of persuasive authority only in this country, and secondly, that the assumption relied on concerned a statute other than the one before him, though the material parts of both were couched in almost identical language.

D. W. LOGAN.

Corporate Entity

The perennial problem, whether and in what circumstances the veil of corporate entity can be lifted appeared in a somewhat unusual setting in *Smith, Stone and Knight, Ltd.* v. *Birmingham Corporation*, [1939] 4 All E.R. 116.

The tendency rigidly to uphold the strict separation between the assets and liabilities of the corporate person and those of the incorporators prevails in company law proper and in private law in general. A more "realistic" attitude has sometimes been adopted in revenue law. The case

[illegible]eview is remarkable for an application of principles developed in [illegible]ue law to the allocation of assets between a subsidiary and a parent [illegible]pany.

A parent company which was a paper manufacturer owned or controlled [illegible]ll the share capital of a subsidiary company carrying on the business of waste paper merchants, the directors of both companies being the same, and getting their remuneration exclusively from the parent. The subsidiary had no staff of its own except a manager who had no access to the books which were kept by the parent. No dividend was ever declared by the subsidiary, its profits were simply treated as those of the parent. The premises on which the subsidiary company's business was carried on was owned by the parent and let at a nominal rent to the subsidiary on a yearly tenancy. The corporation of Birmingham intended to purchase these premises under their compulsory powers, and the question arose whether the parent or the subsidiary was the proper party to claim compensation for disturbance of the business. In the latter case the corporation of Birmingham would have escaped payment altogether because by section 121 of the Lands Clauses Consolidation Act, 1845, no compensation is payable to an occupier whose tenancy does not exceed one year. The parent company argued (1) that their business "embodied their subsidiary company" and that the subsidiary "carried on its trade as a separate department of" the parent so that the rent was "an inter-departmental charge and merely a book-keeping entry"—in other words, they said that the business belonged to the parent which carried it on in the name of the subsidiary. They also tried to establish (2) that the subsidiary were acting as agents for the parent, and that (3) any loss suffered as a consequence of the exercise by the corporation of its compulsory powers would be suffered by the parent directly and not in its capacity as shareholder of the subsidiary.

In deciding in favour of the parent company, Atkinson, J., made use of the ample material on this question contained in a large number of revenue decisions. It appears that the case of *Salomon* v. *Salomon & Co.*, [1897] A.C. 22, has been frequently misunderstood. A company or other corporate entity can act as principal or agent. It can carry on its business as an agent for an individual or for another corporation, and, if it does, the assets and liabilities which appear to be its own are in fact those of the principal. *Salomon's* case establishes that a company does not become an agent of a shareholder by virtue of the mere fact that he controls all or most of its capital. If, however, there is in addition to capitalist control what one may call functional control the question becomes one of fact. If the shareholder (1) treats as his own the profits of the company, (2) appoints the person conducting the business, (3) is the "head and brain" of the trading venture, (4) decides what capital should be embarked on the venture, (5) makes the profits by his skill and direction, (6) is in effectual and constant control, then the company can be regarded as his agent. These criteria, well recognised in revenue cases, were now applied in order to determine the question whether the business carried on in the name of the subsidiary could be regarded in law as being that of the parent. There could be no doubt that the parent had "complete control of the operations" of the subsidiary. In these circumstances the existence of the subsidiary as a separate legal entity could not prevent the judge from treating the business as that of the parent.

The extraordinary wide scope of the conception of agency (which, it

is believed, is a feature almost as peculiar to English law as the tr
cept) enables the Courts to get over some of the worst consequen
the fiction of "corporate personality," just as it goes a long wa
removing the hardships caused by the absence of the *contractus in favor
tertii*. In implying an agency relationship between shareholder and com
pany the Courts are in a position to draw a border-line between those
cases in which the separate "legal personality" can properly be treated as a matter of mere inter-departmental accounting and those in which economic reality justifies full effect to be given to the corporate entity principle. Some of the abuses made by unscrupulous shareholders in claiming the benefit of limited liability may thus be checked, even outside the all too narrowly circumscribed limits of s. 275 of the Companies Act.

It should not be thought, however, that revenue law is immune from the adverse effects of "corporate entity." A recent illustration comes from Canada. In *Pioneer Laundry and Dry Cleaners, Ltd.* v. *Minister of National Revenue*, [1939] 4 All E.R. 254, the question before the Privy Council was whether a company (B) had a right to a depreciation allowance under a Canadian revenue statute. The assets in question had been acquired by company (B) from another company (A) of the same name which had gone into voluntary liquidation. The share capital of company (A) had been controlled by a holding company (J), which had also gone into liquidation, and company B was controlled by a new holding company (H), the shareholders of which were identical with those of (J). After a series of very complicated transactions (which it is unnecessary to describe in detail) involving the liquidation of a number of companies and the shifting of the assets in question through various hands, the situation was, therefore, that the assets had passed from one company to a new company of the same name, and the shares in this new company were held by a new holding company controlled by the same shareholders who had owned the share capital of the holding company controlling the old operating company. No change had taken place in the actual capital interests involved, all that had happened was the replacement of one operating company by another and of one holding company by another. Under the Canadian statute the revenue authorities were at liberty to use their discretion in making depreciation allowances, but the Judicial Committee held that in using their discretion they were not entitled to disregard the fact that the "new" operating company had "acquired" the assets in a depreciated state. The Minister of National Revenue " was not entitled in the absence of fraud or improper conduct, to disregard the separate legal existence of the appellant company and to inquire as to who its shareholders were and its relation to its predecessors. The taxpayer is the company, and not its shareholders."

O. KAHN-FREUND.

Foreign Money Debts—Conversion into Sterling

The decision of the Court of Appeal in *Madeleine Vionnet et Cie.* v. *Wills*, [1939] 4 All E.R. 136, lays down that "a creditor in respect of a debt incurred in a foreign currency is entitled, in a suit in our courts, to recover the equivalent in our currency according to the rate of exchange prevailing at the date when the debt became payable."

The defendant, apparently a woman resident in England, became liable to pay to the plaintiffs, a French firm carrying on business in France, the sum of 8,100 frs. for clothes supplied in Paris. The sum was payable in

er, 1936, when the equivalent of 8,100 frs. in sterling was £105 odd. sued in England in December, 1938, the defendant paid into Court dd, being then an amount sufficient to buy 8,100 frs. The Court of eal held that the defendant had not discharged her liability by this yment and the plaintiffs were entitled to receive from her the amount f £105, i.e. the sterling equivalent of her franc debt at the time when payment was due.

In order to appreciate the implications of this important judgment, it is necessary to see it against the background of a number of earlier decisions rendered by the Courts in recent years. It is fundamental that an English Court cannot give judgment for the payment of an amount in foreign currency. Where, therefore, money is payable in foreign currency, it must be converted into sterling in order to formulate the judgment to be given by the English Court. The rule that judgments can only be given in English currency is a rule of English procedure. Its application is, therefore, independent from the question which law governs the relationship between the parties. It is irrelevant whether the proper law of the contract before the Court is English or, as in the present case, foreign, whether the tort for which damages are claimed was committed in England or abroad, or whether the will which forms the basis of a pecuniary legacy in foreign currency claimed in an English Court is subject to English or foreign law.

What is the proper date for the determination of the rate of exchange to be applied to this transformation of foreign currency into sterling? Obviously this question is of decisive importance in a period of vast and rapid fluctuations in the value of foreign currency as well as of the value of sterling expressed in gold. The ideal—from the point of view of justice and fairness to the parties—is that the debtor (defendant) should not derive any profit from the fact that he postponed the payment of his debt or of the damages owing to the creditor (plaintiff), and that the creditor should not be allowed to gain any advantage by delaying his action and by bringing his suit in an English Court.

If the rate of exchange prevailing at the date when the debt fell due or damages became payable is selected for conversion into sterling, substantial justice is done to both parties as long as the *moneta fori*, the pound remains stable. The creditor is not affected by any fluctuation upward or downward of the foreign currency in terms of sterling after the date when he ought to have received his money, and the debtor does not make any profit by postponing his payment. If, however, the pound falls between the date when payment should have been made and the date when the creditor receives his money by execution or satisfaction of the judgment, the debtor has been allowed to make a profit at the expense of the creditor by speculating in English currency in deferring his payment. This latter result could be avoided if, in addition to his ordinary claim for damages or debt, the law allowed the creditor to recover substantial damages for postponement of payment. Such a claim, however, is unknown to English law which takes the view that interest is a sufficient compensation for the loss suffered by non-payment of money during a given period

It has been suggested that the proper date for conversion is not that when payment fell due, but a later date, e.g. the date of the actual (though belated) payment, the date of the writ, or the date of the judgment. If any of these dates were adopted, the risk of depreciation of the foreign currency

would be imposed on the creditor for the time between the mom[illegible] he should have received his money and the date selected. He [illegible] however, *pro tanto* be secured against depreciation of sterling, whil[illegible] debtor might derive an advantage from an appreciation of sterling in meantime.

It was laid down by the House of Lords in *S. S. Celia* v. *S.S. Volturno*, [1921] 2 A.C. 544, that in the case of a claim in tort the proper date for conversion is that of the commission of the wrong, at any rate if the claim is "for fixed and definite damage due to the conditions [illegible] particular date." The Court of Appeal is said to hav[illegible] *Fernando* v. *Simon, Smits & Co., Ltd.*, [1920] 3 K.B. 409 [illegible] of a claim for unliquidated damages for breach of contrac[illegible] for the conversion is that of the breach (though it may be [illegible] action in *Di Fernando* sounded in tort).

By the present decision the breach-date rule thus ado[illegible] damages was extended to the case of contractual debts. T[illegible]ed been decisions to the same effect by courts of first instance, [illegible]e was a somewhat inconclusive decision of the Court of Appeal i[illegible] *Lloyd Royal Belge S.A.* v. *Louis Dreyfus & Co.*, [1927] 27 LL.L.R. 288, which seems to suggest the same principle though the point was expressly left undecided. This decision was not quoted to the Court in the case under review, nor is it mentioned in the judgment of Clauson, L.J., who delivered the judgment of the Court. It is analysed in Dr. Mann's book on the *Legal Aspect of Money*, at p. 297.

While the date of conversion is determined by English law, *qua lex fori*, the discharge of a monetary obligation subject to French law is governed by French law alone. In *Société des Hôtels Le Touquet-Paris-Plage* v. *Cummings*, [1922] 1 K.B. 451, the Court of Appeal held that the proper law of a contract governs its discharge even if the contractual obligation is already before an English Court. That case was on all fours with the case under review, except that instead of paying a sterling amount into Court the debtor went to France and paid to the French creditors the nominal amount owing in depreciated French currency. This was held to be a good discharge of the obligation and the action was dismissed. If the defendant in the present case had used her £65 to buy 8.100 frs. and taken (or sent? *quære*) them to France, she would have won her case. In other words: the creditor derived an unwarranted benefit from the facts that (1) he sued in England, and (2) the debtor made a technical mistake. It is submitted that the injustice involved in this result is not inherent in the decision under review, but either in the *Le Touquet* judgment or in the principle that the English Courts cannot give judgments in foreign currency. The effect of the latter principle is that, once a monetary obligation is submitted to an English Court, its measurement becomes to some extent a matter of English law. The rate of conversion affects the substantive relation between the parties and thus, by choosing to sue in an English Court, the plaintiff attracts English law to a relationship entirely unconnected with England. Once, however, this principle is accepted, its application should not stop short of a discharge of that obligation out of Court. The combined effect of the *Le Touquet* decision and the present case is to give the debtor the option either to convert at the present rate of exchange by payment out of Court or at the rate of exchange at the time when he ought to have paid by payment into Court, because the former payment is governed by the *lex causae*, the latter by the *lex fori*.

...on, L.J., formulated the rule quoted above in such a way as ... to show that it only applied "in a suit in our courts." Had no ... been brought at all, English law would have had no say in the matter, ... the defendant might have discharged her obligation by choosing a ...te of exchange more favourable to her. This shows again the inconveni...nce of the encroachment by the *lex fori* on the *lex causae* which is the necessary consequence of preventing an English Court from giving judgment in foreign currency.

Despite its highly technical character, the question under discussion is of great interest to the student of judicial psychology. The effect of the *Volturno*, *Di Fernando* and *Vionnet* cases is the universal adoption of the breach-date rule by the English Courts. As stated above, this rule does justice to the parties as long as the pound is stable, but it may be harmful to the creditor and lead to unfair results if the money of the forum depreciates between the date of breach and the date of judgment. It seems clear that this latter aspect of the matter was not considered by the Courts. Their confidence in the stability of their own currency made them adopt a rule which fulfils its purpose only as long as the pound is stable and foreign currencies fluctuate.

If the Courts are ever faced with the opposite situation, the rule might be revised or the power of giving judgment in foreign currency might be introduced by legislation. Another possibility would be to give the creditors the hitherto unknown claim for damages on the ground of delay of payment.

O. KAHN-FREUND.

Trade Unions

Miller v. Amalgamated Engineering Union. 54 T.L.R. 776

In view of the comparatively few cases bearing on the status of Trade Unions, this case is worth consideration. It was an action by the son of a member of the defendant Union, whose estate he was administering. He asked for a declaration that his father was at the time of his death a fully qualified member of the Union and that he as plaintiff was entitled to be paid the sum of £123 15s. 0d., which he claimed to be due to his father by way of superannuation benefit in arrears. He asked, alternatively, for an injunction to restrain the Union from applying, for the benefit of other members, funds of the Union which should have been paid to him. The defence made by the Union was that it is an unlawful association at common law, that it is a trade union registered under the Trade Union Act, 1871–1927, and that by virtue of the former statute the Court could not entertain the action.

Section 3 of the Trade Union Act, 1871, provides: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." But certain limitations are imposed by Section 4, which states that "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of (*inter alia*): Any agreement for the application of the funds of a trade union (*a*) To provide benefits to members. . . . But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

The question to be decided was whether proceedings could be instituted

apart from the Act, in which case the Court could entertain whether it was necessary to rely on the validity conferred by Sec in which case the prohibition laid down in Section 4 would come operation.

Mr. Justice Morton scrutinised at length the statutory provisio relating to the definition, objects and purposes of a trade union, an emphasised the extreme importance of the rules of a union in determining whether or not a trade union is lawful at common law. In this instance the union's rules impose very definite restrictions on the way in which the members of the union can carry on their trade, and although every restraint of trade is not unlawful, the learned Judge stated that he was satisfied that the Amalgamated Engineering Union is an association unlawful at common law. Moreover, the objects contained in the rules in restraint of trade cannot be separated from the objects which provide benefits to members. The result was that the Court, by reason of Section 4 of the Trade Union Act, 1871, was not able to entertain the action which had been brought for the purpose of directly enforcing an agreement to provide benefits to a member.

In the course of his judgment Mr. Justice Morton stated that a registered trade union must be deemed to be a trade union within the meaning of the Trade Union Acts.

W. A. ROBSON.

Rating

As was anticipated, the House of Lords has, in *Robinson Bros.* v. *Houghton, etc., Assessment Committee*, [1938] 2 All E.R. 79, upheld the judgment of the Court of Appeal in over-ruling *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q.B. 630, which case has, for the last thirty years, governed the assessment, for rating and taxation purposes, of licensed houses—for facts see note at 1 *M.L.R.* 163/4. Lord Macmillan, who delivered the unanimous judgment of the House, held that, in arriving at the rent which a hypothetical tenant would pay, regard could properly be had to the rent which competing brewers would be prepared to pay to the landlord of the property—with whom, of course, there was no personal consideration as there was with the tied tenant—bearing in mind that they could either occupy the house themselves by a manager or sublet it to a tied tenant. In the latter case the brewery company would not be the rated occupiers and it is difficult to see how regard could be had to the rent which an immediate lessor would be prepared to pay to a superior landlord. In practice, however, rating authorities will probably get round this technical difficulty by looking to the rent which a hypothetical brewer would be prepared to pay for the premises as a managed house. Like the Court of Appeal, the Lords refused to apply the doctrine of *stare decisis*, *Westminster C.C.* v. *Southern Railway Co.*, [1936] A.C. 511 being followed, on the ground that it would work grave injustice since an unduly low value improperly placed on licensed premises puts an unjustifiable burden upon other properties.

A. FARNSWORTH.

Effect of Nullity Decree—Mistake of Fact—Unjust Enrichment

The decision of the Court of Appeal in *Re Eaves* (1939), 56 T.L.R. 110, raises several problems of great practical and theoretical importance.

the will of a testator, his widow, the plaintiff, was to enjoy the ɜ of a trust fund during her life and widowhood. The residue of the ɹte was to go to the testator's son, who was joint executor and trustee ɥh the plaintiff. After some time, the plaintiff decided to marry again, ɹnd accordingly handed over the investments of the trust fund to the son, before the marriage ceremony took place. The defendant converted the funds to his own use. After twelve years of marriage, the plaintiff was granted a decree of nullity, on her petition, and she then claimed a declaration that she was still entitled to a life interest in the fund, on the ground that her widowhood had never been terminated, and the fund had been handed over to the defendant under a mutual mistake.

The Court of Appeal affirmed the decision of Farwell, J., in dismissing the action, and the three appeal judges were, on the whole, in agreement about the grounds for doing so. They all emphasised that the decree of nullity, despite its categorical wording, did not annul the status of marriage with retroactive effect, at least in regard to transactions concluded during the existence of the *de facto* marriage. They also agreed that there was no basis for a claim for recovery of the life interest formerly enjoyed by the plaintiff, or its equivalent. Clauson, L.J., further thought that the plaintiff was estopped from questioning the legality of the transfer to the defendant, having herself led him to believe in the validity of the transaction, through her own action. But Goddard, L.J., doubted the soundness of this ground, in view of the delicate and intimate nature of the reasons which might delay the exercise of the option to ask for a decree of nullity.

The form of the decree of nullity which declares the marriage to have been and to be absolutely null and void to all intents and purposes in the law whatsoever, suggests a complete nullification of the marriage with all its corollary and collateral effects. To apply this in practice, would be manifestly impossible. It would mean, for example, that the authority of a wife to contract for her husband might be cancelled with retrospective effect, thus undoing an unlimited sequence of transactions which might have been concluded on the basis of that implied authority. In the careful analysis of the authorities, which Lawrence, J., made in *Dodworth* v. *Dale*, [1936] 2 K.B. 509, the learned judge came to the conclusion that "on every occasion on which it (i.e. the question of the effect of the decree upon transactions, concluded before the marriage annulled) has been alluded to, the learned judges who dealt with the subject have indicated that transactions which have been concluded, things which have been done during the period of the supposed marriage, cannot be undone or reopened after the marriage has been declared null and void." A similar principle was applied by Farwell, J., in *Fowke* v. *Fowke*, [1938] Ch. 774. On the other hand, it would be impossible to contend that the decree leaves the marriage fully intact up to the moment of its issue. The object of the decree is certainly to "put at rest for all time the question whether the parties were lawfully married and are or are not free to marry again during the lifetime of the other." It would probably be more logical, as Goddard, L.J., suggested in his judgment, to treat impotence as a ground of divorce as in America, instead of having assimilated it to the cases of bigamy, consanguinity, non-age or undue celebration in all of which the marriage is void *ipso facto*, and without necessary intervention by parties and Court. As matters stand, the decree for nullity on the ground of impotence makes the marriage not void, but voidable *ab initio*, and that raises the interesting

jurisprudential problem of what in German Jurisprudence is [redacted] *Grenzen der Rückwirkung* (limits of retroactive effects). That the sta[redacted] *de facto* marriage cannot be undone in regard to collateral transaction[redacted] certain. Theoretically the best explanation for the adjustment of cc[redacted] flicting interests which the law must provide, is the analogy of the *bon[redacted] fide* holder in due course. Where the *de facto* status has given rise to rights of third persons who are not concerned with the internal circumstances of the married parties, their *bona fide* rights are protected, and the retroactive effect of the decree correspondingly confined.

The plea of mutual mistake was rejected by the Master of the Rolls on the ground that it was a composite mistake of fact and intention, "of intention in so far as the exercise of an option by the appellant was required before annulment could take place." But it is submitted that this ground would hardly support the decision. Assuming that the understanding was that the marriage would not be annulled when the trust fund was transferred, the understanding would have been that the marriage was a fully valid one, one not susceptible of annulment. To hold otherwise, means to penalise a party for the exercise of an option which the law confers.

On the question of recovery all the learned judges were short and categorical, yet the question is a very interesting one. On the assumption that English law knows no general principle of unjust enrichment, but only specific actions for recovery of money, an assumption probably still broadly correct, although subject to very considerable reservations,[1] it is true that no money had been paid which could be recovered. But English law knows very well how to recover property which should be restored despite many changes in form. *Re Hallet's Estate* (1879), 13 Ch.D. 696, has made that clear, and the case of *Banque Belge* v. *Hambrouck*, [1921] 1 K.B. 335, illustrates it. A bank, in that case, could recover the proceeds of a cheque forged and fraudulently converted by one of its employees, from his mistress, who had paid part of the proceeds put at her disposal into her own bank account. Equity has no difficulty in following a trust fund, through investments, into the proceeds, and on that point the learned judges seem to have been altogether too brief. Assuming a relevant mistake, there is no difficulty in holding that the enrichment on the side of the transferee corresponds to the empoverishment on the other, to take the predominant continental and American formula, applied by Lord Wright in *Brook's Wharf* v. *Goodman*, [1937] 1 K.B. 534 (C.A.). The only difficulty would consist in the change of position incurred by the transferee. The defendant here has spent the money obtained, and in such a case continental systems and the *American Restatement on Restitution* agree that there is a good defence to a claim based on unjust enrichment. English law is very confused on that point, as the conflicting decisions of *Holt* v. *Markham*, [1923] 1 K.B. 504, and *Jones* v. *Waring and Gillow*, [1926] A.C. 670, show. The decision thus seems to confirm that as yet there is no principle of unjust enrichment in English law, beyond the specific actions for money had and received, and, it must be added, the supplementary remedies in Equity, based on the same principle.[2]

W. FRIEDMANN.

[1] Cf. the present author's *Principle of Unjust Enrichment* in 16 *Can. Bar Review*, 247 *et seq.*; 369 *et seq.*

[2] Cf. Holdsworth, 55 L.Q.R. 51; Friedmann, *loc. cit.*

Cars as Dangerous Things. Opportunity of Inspection

One short point of an interesting, but somewhat lengthy decision in *Grschthal* v. *Stewart & Ardern, Ltd.* (1939), 56 T.L.R. 48, was the meaning of that unfortunate test, the "opportunity of inspection" brought up by *Donoghue* v. *Stevenson* and differently interpreted ever since.

The defendants, a firm of motor car engineers, had delivered a reconditioned Morris car to a firm, Utility Products, Ltd., of which the plaintiff was a director. On behalf of that company, he had inspected the car, had trial runs, taken delivery and signed a receipt which stated that the car had been "seen, tried and approved by me" and "supplied on the usual hire-purchase agreement of the terms of which I am aware."

The car was delivered by a servant of the defendant company, who drove the plaintiff for a distance of several miles, without there being evidence of a defect. But the next morning, when the plaintiff took the car out, the rear near wheel came off when he turned, and the plaintiff suffered shock, for which he claimed damages. It was proved that the nuts securing the wheel had not been tightened properly.

There was, of course, no contractual duty between the parties, and the sole ground of liability could be negligence, under the principle of *Donoghue* v. *Stevenson*. The question was whether the claim failed because the defendant had had an opportunity of inspection. The learned judge, after a careful review of a number of cases on that point, came to the conclusion that the better test was not opportunity of inspection in the physical sense, but duty of inspection. It must be asked whether the plaintiff, considering all circumstances, could reasonably be expected to make an inspection, and the learned judge decided that in this case the question had to be answered in the negative. The weight of authority, and, it is submitted, of social justice supports this decision. The social significance of the modern tendency in the law of tort, in which *Donoghue* v. *Stevenson* has played such a powerful part, is the insurance of the public against the dangers of modern mass manufacture and trade. As in all cases of legal liability, the risk must rest with one of the two sides, and it is for the law to decide, in accordance with the principles of social policy which guide it at the time. Modern developments[1] have thrown the risk upon the manufacturer, trader, etc., in relation to the injured member of the public, not absolutely but almost so, if one considers the modern conditions of negligence as stated by *Donoghue* v. *Stevenson* and developed, above all, by *Grant* v. *Australian Knitting Mills*, [1936] A.C. 85. It would be strangely inconsistent if the purely accidental fact whether there was a physical and technical possibility of inspection of the article by the consumer or user, should affect liability. A man who buys ginger beer in an opaque bottle has no such opportunity, a man who buys underwear in a store has. But can anyone seriously suggest that a buyer of underwear should subject it to chemical tests as to sulphur content, etc.? Yet Lord Wright's pertinent observations on that problem were ignored by Hawke, J., in *Dransfield* v. *British Insulated Cables* (1937), 54 T.L.R. 11, where the risk of not testing bullrings supplied in thousands by a first-class manufacturer was thrown upon the buyer, a local authority. The grave consequences of such a decision have been exposed by Professor Goodhart in 54 L.Q.R. 59. The decision in *Dransfield's* case seems now to be isolated, and the learned judge in the present case might well have added to the authorities

[1] See "Modern Trends in the Law of Torts," in 1 M.L.R., pp. 39 *et seq.*

discussed the careful decision by Goddard, L.J., in *Paine* v. *Colt Electric Supply Co., Ltd.* (1939), 160 L.T. 24, which reached the result in the case of defectively protected electric insulators which caused the death of a workman.

A question not so far discussed by the Courts is whether the injured person and a third party are in the same position with regard to the duty of intermediate inspection. Obviously the legal position is different where the duty is incumbent on the injured person himself from what it is where an intermediate party should have charged himself with the inspection. In the first case the defence is either that there is no breach of duty at all or that there is contributory negligence, or that the chain of causation is interrupted. Where an intermediate party fails to inspect, as in the *Dransfield* case (assuming there was a duty to inspect at all), there is no reason why the manufacturer should be excused, rather than be jointly and severally (or, perhaps, severally) liable with the intermediate party. The present case did not make an examination of this question necessary, but it will undoubtedly come up for decision some time.

W. FRIEDMANN.

Unjust Enrichment as a Defence

The main interest of the decision in *Ayres* v. *Moore* (56 T.L.R. 145) lies in the possibility—discussed by Hallett, J.—of something like the principle of unjust enrichment being used as a defence, and not as supporting an action for money had and received.

The defendant had been induced to accept a bill of exchange by the false representation made by a certain Mr. Fisher that the bills were required to secure advances which the plaintiff had made to him for the purpose of financing the purchase of certain patents for a company of which the defendant was the chairman and director, and Fisher was secretary. In fact the bills were for personal advances. Had it been as Fisher represented, the defendant would have had an interest to accept the bills, in order to prevent difficulties to the company of which he was chairman. He would, however, have been under no obligation to accept the bills.

The defendant was successful on the ground of fraudulent representation, a matter which requires no comment. The defence of mistake the learned judge rejected, on the ground that the mistake must be as to a fact which if true would make the person paying liable to pay the money, not where, if true, would merely make it desirable that he should pay the money. This is certainly the law, as laid down in *Aiken* v. *Short* (1 H. & N. 210, *per* Baron Bramwell, at p. 215) and in *Kelly* v. *Solari* (9 M. & W. 54, at p. 58). But the interesting point is that the defendant used as a defence to an action on an acceptance his alleged mistake referring to his duty to give the acceptance. In other words: he tried to obtain restitution of his acceptance on the ground of his mistake of fact. Had the mistake been relevant, this would have been a case of the recovery not of money had and received, but of an obligation incurred, a *condictio obligationis* as described by Ulpian in D. 12, 7, 1, p. "*Est et haec species condictionis, si quis sine causa promiserit . . . Qui autem promisit sine causa, condicere quantitatem non potest quam non dedit, sed ipsam obligationem.*" For such a use of what is in effect the principle of unjust enrichment the learned judge could not find an authority, but he saw no difficulty in principle, provided

rules regarding the nature of the mistake were applied as with on for money had and received.

e other grounds of the decision require no comment, except the vation that, under section 27 of the Bills of Exchange Act, there was d consideration for the bill, since there was an antecedent liability or ebt, namely Fisher's debt to the plaintiff. This would mean that the liability of a third party can be an antecedent liability in the relations between the parties to a bill of exchange.

W. FRIEDMANN.

Dishonour of Cheque—Damages

The short and unsatisfactory judgment of Lawrence, J., in *Gibbons* v. *Westminster Bank, Ltd* (1939), 55 T.L.R. 888, settles, at any rate for the time being, a much discussed point of banking law, namely whether the dishonour of a cheque by a banker carries with it the liability to pay substantial damages only in those cases where the drawer is a trader, leaving aside, of course, cases where special damage can be proved. The general rule that only such amount of damages as can be proved may be recovered is very strictly applied, and the number of exceptional cases will not be extended (*Addis* v. *Gramophone Co.*, [1909] A.C. 488).

Among these exceptions that relating to the dishonour of cheques is of considerable importance and appears first to have been suggested rather more than a century ago by Lord Tenterden in *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415, though in that case the point at issue was whether any damages could be recovered at all without proof, the breach of duty having up to that time been regarded as a tort rather than a breach of contract. The case is indeed significant as illustrating the marked tendency which existed at that time to reduce as many mercantile problems as possible to terms of contract. During the ensuing period the law of contract was developed with an eye to the requirements of the mercantile community, and since the expansion of the cheque system made the punctual payment of such instruments a matter of grave concern to business men it is little wonder that Lord Tenterden's hint was taken up and expanded in *Rollin* v. *Steward* (1854), 23 L.J.C.P. 148, so as to establish the rule that a trader whose cheque has been dishonoured may recover damages as if he had been slandered by an imputation of insolvency.

It remained to be decided whether this right was limited to the business community. Curiously enough, in spite of various dicta mostly in favour of limiting the rule, we have had to wait for nearly a hundred years for the solution, meanwhile the problem is known to have caused considerable concern to bankers who have been able to avoid a decision in a number of cases by settlement of claims. In the instant case since the plaintiff had suffered no discoverable damage and was a married woman not likely to be especially discredited by the dishonour of a cheque, the defendants were able to contest the matter on the most favourable set of facts likely to be open to them. The decision of Lawrence, J., justified their conduct. The reasons of the learned judge hardly go beyond the interpretation placed upon *Rollin* v. *Steward* (*supra*) in some of the textbooks (cf. Grant, *Law of Banking*, 7th ed., p. 88; Paget, *Law of Banking*, 4th ed., p. 178), and what appears to be a misunderstanding of *Addis* v. *Gramophone Co.* (*supra*). In that case the House of Lords considered that the number of types of case when substantial damages can be recovered should not be extended, not that the scope of the rule relating to the dishonour of cheques

should not be extended. In fact the rule is stated by the House in that case in quite general terms, and does not confine to traders the right to recover such damages.

There are, indeed, other classes of citizens whose reputation is just as likely to suffer serious harm from the dishonour of their cheques as a trader's, among these are various kinds of professional men such as solicitors and accountants, while in the army it was at one time, and may still be, the etiquette to require an officer whose cheque had been dishonoured to send in his papers. It may indeed be questioned whether the decision of Lawrence, J., in this case is to be regarded as more than *obiter* in relation to persons belonging to classes of those kinds. Even so, however, the relevance of *Rollin* v. *Steward* (*supra*) to the facts of the present day may be questioned. A century ago few outside the business world made use of the cheque system; now every person of any substance, and many of none, has a bank account, and *prima facie* it is a serious blow to the reputation of any one of us to have his cheque dishonoured. A good case, therefore, for requiring very great care from bankers in the handling of such instruments, and for keeping them up to their task, visiting failure with the liability to pay heavily for it.

R. S. T.

Insurance on a C.I.F. Contract

The doctrine of the reasonable man, in this case the reasonable business man, plays as important a part, if not a more important one, in mercantile law as in any other branch of English law. In fact, wherever it is applied in connexion with the law of contract it may well owe its origin to the law merchant the incorporation of which into the common law was paralleled by, and only made possible by, the rapid development of a law of contract. The c.i.f. contract for the sale of goods affords a valuable illustration of this point, and is exemplified in an interesting manner by *Oulu Osakayetio, etc.* v. *Arnold Laver & Co., Ltd.*, [1939] 4 All E.R. 88. A c.i.f. price normally of course includes the costs of the insurance, but since rates of premium change from time to time it is not uncommon to provide that any increase over a basic rate which may or may not be the rate ruling at the time the contract is made shall be added to the purchase price. This happened in the instant case. Owing to the increasing danger of war, premiums on policies covering war risks, which was called for by the present contract, had risen substantially by the date the goods came on risk. But on Spanish Government-owned ships which were being sunk by the insurgents the rate rose even more steeply. However, the shippers had chartered for the transport of the goods in question a vessel belonging to the Spanish Government, with the result that a very substantial addition was made to the invoice tendered to the buyers for payment. They refused to pay anything above the rise in the premium rate which had taken place for shipping generally.

It is a well-known rule in connexion with c.i.f. contracts that the seller must make a "proper" contract both of affreightment and of insurance (cf. *Scrutton on Charter Parties and Bills of Lading*, Art. 59). The usual criterion of a "proper" or reasonable contract is that which is usual in the trade, and circumstances even remotely resembling those of the instant case do not appear to have arisen previously. The principle of the thing is clear, however, viz. that "the shippers should act reasonably where they are to take a step which will impose a burden upon their contracting

(p. Atkinson, J., at p. 90). The learned judge was of opinion that lers ought not to have chartered a belligerent vessel or any vessel h was so circumstanced as to lead to the requirement of a premium ond the ordinary schedule rates. He accordingly found that the buyers re not liable to pay more than the general increase in the rate, i.e. they escaped the extra amount payable on Spanish ships.

This reasoning is likely to find general favour. Whether the decision is correct on the facts, however, is perhaps doubtful, as the evidence showed that the Spanish steamer had been chartered some weeks before the sinking of another Spanish Government vessel in the North Sea had first brought about a difference in the premium payable by the Spanish Government and other owners. Surely the crucial date at which the reasonableness of the seller's conduct is to be judged is that when he entered into the contract of affreightment?

R. S. T. C.

The Finance of Hire-Purchase Agreements

The points raised in *Transport & General Credit Corporation, Ltd.* v. *Morgan*, [1939] 2 All E.R. 17 were not, legally speaking, difficult of solution, but the case is well worth looking at because it gives a very good idea of the difficulties attending the highly important problem of financing hire-purchase sales. The methods employed, of which there are two main types, have been described in a number of cases, e.g. by Scrutton, L.J., in *Owen and Smith* v. *Reo Motors (Britain), Ltd.* (1934), 151 L.T. 274, and by Lawrence, L.J., in *In re George Inglefield, Ltd.*, [1933] 1 Ch. 1 at p. 24. There is no need to go into these matters here: further information will be found in Dunstan's *Law of Hire-Purchase*, 4th Ed., Chap. XVII. In substance a finance company is intruded into the hire-purchase transaction in such a way that the retailer who actually disposes of the chattels obtains the whole of the purchase price at once, and is therefore able to pay the manufacturer at once—under the old system one or other had to wait for his money, i.e. to bear the burden of financing the transaction. The finance company now takes over this responsibility and receives the instalments of the hire-purchase price as they fall due. It naturally makes a charge for the service in the form of a charge for interest upon the money advanced. The difference between the cash and the hire-purchase price of an article is, of course, represented by this interest charge. The variations of method mentioned above are concerned with providing security for the finance company. This is naturally a very important matter, and the problem is normally solved by (*a*) making the goods themselves available and (*b*) supporting this by guarantees from the retailer and/or manufacturer. Very frequently the goods are sold by the retailer to the finance company in the first instance, the latter then hire-selling them to the consumer. In this way the company obtains the right to seize the goods should payment fall into arrears.

The importance of this type of development is well brought out by Simonds, J., in the instant case where he says (p. 28) "it must be remembered that hire-purchase agreements play a very large part in the commercial and social life of the community, and the financing of these hire-purchase agreements is an enormous business, both in the City of London and elsewhere." It is not necessary to describe the complicated facts of this case in detail. It is sufficient to say that the manufacturer had become involved in the transaction as a guarantor of the finance company, and that

the action was brought by the finance company against the manufa on his refusal to pay up under the guarantee. The retailer which v company owned by the manufacturer had gone into liquidation, and action arose in connection with the winding-up proceedings.

Of the defences put up by the manufacturer we may notice two, th one much more important than the other, viz. that the finance company was nothing more or less than a moneylending concern and the whole transaction one of moneylending subject to the provisions of the Moneylenders Acts as regards registration; forms of contract, etc. If this had been so the contract upon which the plaintiff sued would have been unenforceable. But while this type of finance is, like most others, concerned with the lending of money it is not moneylending in the ordinary use of that expression. As Simonds, J., pointed out "the financiers and the dealers co-operate in the common venture of making feasible the whole business of hire-purchase agreements which is now for good or evil, a necessary part of our social life."

It need hardly be said that had this defence succeeded it would have knocked away the foundation upon which the whole superstructure of modern hire-purchase selling has been erected. The lighthearted way in which business people, or their legal advisers on their behalf, in order to gain a personal advantage are content to imperil the very institutions upon which their business depends would be astonishing to any one not acquainted with the jungle life which exists in the modern business world. It may be noted that this is not the first time that the attempt has been made to torpedo the financial arrangements for a hire purchase agreement with equal lack of success (see *Olds Discount Co., Ltd.* v. *Playfair, Ltd.*, and *Olds Discount Co. Ltd.* v. *Cohen*, [1938] 3 All E.R. 275).

The other defence, not less revolutionary in its implications, was that the manufacturers continued to hold an equitable lien over the goods and were therefore entitled to get them back from the retailer notwithstanding a floating charge over his assets which had been granted to the finance company, and which, of course, covered the goods actually supplied by the manufacturer to the retailer. Since the property in these goods had presumably passed from manufacturer to retailer at the time when they were supplied according to the ordinary rules it is a little difficult for a mere commercial lawyer to see any basis upon which an equitable lien could arise, and indeed so far as the report indicates nobody engaged in the case took the trouble to explain this fundamental point from first to last. It is obviously a dangerous doctrine from the mercantile point of view, and one is glad that Simonds, J., found no less than three reasons, each more conclusive than the last, why the contention should be rejected.

R. S. T. C.

REVIEWS

RIGHT OF PROPERTY. By VINDING KRUSE. Translated from the Danish by P. T. FEDERSPIEL. Oxford, 1939. Pp. xvi + 495. **20s.**

The author of this book, Professor V. Kruse, plays almost the same part in the development of Danish and Norwegian law as may be attributed to Sir Robert Torrens in the history of Australian Land Law. Kruse is the great reformer and moderniser of Danish Property Law. The *Thinglysning*—that is Publication—Law of 1926 is his work. This law created a new and better system of transfer of immovable rights and a method of making these rights publicly known which differs from the Torrens system, the German registration system, the French methods of transcription and inscription and the English system. Therefore his views on Property Law as a whole are worthy of being carefully studied both in his native country and abroad. His book, which is a contribution to comparative law, to legal philosophy and to the science of Danish law, appeared in Danish in three volumes, the first of which was published in 1929. A German translation appeared in successive volumes from 1931 to 1938. The first volume has now been published in English. The English translation includes some supplements due to changes in legislation. On the other hand it has been shortened, particularly by the omission of notes which refer to Danish legal sources and Danish literature.

The present volume deals in its first part with the foundation and limitations of the right of property, and in the second part with the origin of this right, its "change," termination, "attribution" and protection. The notion of what the author calls "right of property" is not identical with that of Roman *dominium* or of the French *droit de propriété* or of the German *Eigentumsrecht*. It covers a much wider area. It includes all those rights of which the owner is able to dispose. The author takes the word rather in the sense in which it is used in debates on social systems. Indeed, these systems or, more correctly, three of these systems form the starting-point: the Liberal system of private capitalism, the system of Socialism—which in the author's definition embraces all orders of society in which the political power, the State, operates industry or is invested with property, but from which the author excludes the system of State intervention in and regulation of trade and industry (State control)—and Communism, including all those systems which embrace a general human community of industry or property working independently of the State. He reproaches each of these systems firstly with their "wanton and sweeping generalisation" from certain examples to an all-embracing law of nature, and, secondly, with their disregard of all extra-economic value of property rights. Probably nothing the author says on these points will be new to the student of political economy. Everything may have been said, modified, proved, refuted before. Observations, however, which an eminent lawyer makes on subjects bordering on his own carry weight and deserve consideration.

The way in which the author deals with the non-economic elements of property is particularly remarkable. He distinguishes from "economic" property firstly "intellectual" property—such as authors' and artists' copyrights, patent rights, rights of design—and secondly, "spiritual" property. With regard to intellectual property, he stresses the fact that "if the antagonists of private property were right, we should have to

believe that these rights were an obsolete human institution, a crea
the law which had outlived itself," while in these particularly new
types the idea of private property unfolds "a strange vitality, an impre
power to grow new branches." The author explains this phenomenon
the remark that the "inmost reason of all private property" is to
found in the creation of something new—a statement to which the same
objection (of "sweeping generalisation") may be raised as the author
raises against the three economic systems.

As to what the author calls *spiritual* property, I do not believe that this conception is on the same plane as material and intellectual property. He means "those forces which socially or individually are of a restraining nature," which, e.g., give "spiritual satisfaction" in the sphere of arts or of home furniture; he speaks of things which have a personal and sentimental value because they belong to a particular family, and the like. It is quite true that feelings of this kind ought to be protected by the law—and they are protected (though possibly within too narrow a frame) by laws which prohibit the seizure of a debtor's wedding-ring, which provide that heirlooms shall pass to the heir of the land, which protect places of historical interest or natural beauty by forbidding alterations which would destroy or diminish the immaterial value or aspect of the landscape, and so on. But I do not think that it is useful to set up the idea of spiritual property in the wedding-ring, the heirloom, or the protected land as apart from the material property in these things. It would seem more satisfactory to assume that there is only one property right which is of a material character, and that the content of this right varies according to the nature of the object, that e.g. the right of free disposal may be restricted in view of the public interest or of the interest of neighbours, and the right of enjoying or using the wedding ring may be strengthened against creditors in the "spiritual" interest of the owner. What the author has in view when he thus distinguishes three kinds of property, becomes particularly clear in his observations on the right to letters (pp. 136, 137). When Kierkegaard sent love letters to the beloved of his youth, he transferred to her the material right of property and retained the intellectual property; and if the addressee had presented the letters to a friend, who thus acquired material property, the original addressee would have retained a spiritual property by which she could have prevented publication, just as the sender could prevent this through his intellectual property. Many objections may be raised against this construction. Does not the sender of the letters, too, retain a "spiritual" property? And if a letter written by A to B reveals the secret of A's adulterous relation to Mrs. C., should not Mrs. C, though the letter has never been in her possession, have a spiritual property in it, according to the author's theory? It would be much simpler to explain all the phenomena mentioned by assuming a right of personality which includes the right to forbid any trespass into the secret sphere of a person, than to affirm the existence of a spiritual property in the letters.

The author wants to simplify legal theory on several points. He eliminates firstly the conception of things or tangible objects (p. 121), secondly, the distinction between rights *in rem* and rights *in personam*. As to the latter point (p. 124) he wants—if I understand him rightly—to make sure that the right *in personam*, too, can be regarded as the object of ownership, of a mortgage or of some other right *in rem*. It cannot, however, be denied that the content of a right *in rem* is very different

[redacted]hat of a right *in personam*, inasmuch as the former right may be the [redacted] of an action, though not against everybody, at least against an [redacted]mited number of persons. I doubt whether it is true that "debt-[redacted]ims may quite well be vindicated" (pp. 145, 473). If the debt-claim is [redacted]ncorporated by a document, it can, according to the author, be vindicated by an action against the possessor of the document in the same way as the action may be brought against the possessor of a tangible object. But it must be borne in mind that a document is a tangible object, and that it is this object and not the debt-claim which is vindicated. If there is no document relative to the debt, the author grants a *vindicatio* against the person who actually "exercises the claim, collects interests, etc." Obviously he wants the "possessor" of the claim to be obliged to repay what he has obtained through the exercise of the claim. But even then, it is hardly the claim he vindicates but the tangible objects paid by the debtor to the possessor of the claim, if under the prevailing law of the country the ownership of these objects has been acquired by the creditor—which, for that matter, is neither the case under Roman nor under French or German law.

Rightly the author objects to the definition of the right of property as being a "*formueret*," that is, an economic right ("*Vermögensrecht*"), since it does not apply only to things of economic value. It has, however, never been denied that a right of property on things of no pecuniary value exists, and the property in the curl of the beloved or in the school copy-book of the deceased child have often been quoted as examples. Only in the case of rights *in personam* (claim-debts) has it been asserted that they cannot exist without pecuniary value; but this assumption—which has been based on Dig. 40, 7, 9, 2—is by no means the prevailing doctrine. Nevertheless the inclusion of the right of property in the group of economic rights is, in my opinion, permissible, as legal classifications should not be set up from a merely logical point of view but should start from the most essential social facts; they may ignore peripheral phenomena.

The author's special explanations of the limits of the right of property are of particularly high value and interest. With regard to the differences between expropriation and the general limitations imposed by law on the right of property (p. 174), the author's opinion may be open to discussion. He asserts that limitations imposed by law "in accordance with general objective reasons and considerations" cannot bear the character of expropriations, so that in such cases the private owner cannot demand compensation. I believe that even general limitations are expropriations if the right of which the owner has been deprived by law has been transferred to another person. In cases of this kind it seems equitable to grant to the private owner a claim to compensation against the beneficiary. If e.g. a statute establishes compulsory billeting on all householders having more than a certain number of rooms, it would be unjust to deny them compensation, though the burden imposed on them has been made by way of general limitation of the right of property and in accordance with "general objective reasons and considerations." At p. 179 *et seq.* the author gives a very valuable explanation of Danish agricultural legislation, compared with German and English law. The German translation of Vinding Kruse's work contains, moreover, the author's comparison of Danish Law of land registration with Norwegian, Swedish, Finnish, French, English and German Laws. The English translation omits this.

The author then deals (p. 203 *et seq.*) with the limits of private property in relation to what he calls free nature, that is the sea, the lakes and rivers,

the air and the soil under the owner's land, and, to a certain degre the rules on neighbouring properties. He adds some valuable observa on the limitation of private ownership due to hygienic and spiritual i ests; he discusses forest protection laws existing in various countri housing laws and especially the laws concerning the preservation natural beauty.

The second part, too, is rich in admirable observations, especially in so far as it deals with original acquisition of property. Danish law does not include many distinct rules on the subject, and both the theorist and the judge have therefore a considerable amount of liberty in filling the gaps. The author has of course studied the laws of other European countries, and his remarks show the usefulness of such comparative work for this purpose. When, however, he raises his voice against the distinction between acquisitive prescription (usucapion) and extinctive prescription (limitation), I cannot believe that this reversion to a theory which has been abandoned for over a century by continental doctrine will meet with assent. More original and audacious is what he writes on the conception and the legal effects of possession. He recognises that this conception has done good work in the past, but thinks that now it must be set aside or reduced to a subordinate and auxiliary part in present and future society. I believe he is right.

As a whole, this is one of the most remarkable books in existence on property law, though it does not contain much of what its title would suggest to English readers.

MARTIN WOLFF.

LAW IN THE MAKING. By CARLETON KEMP ALLEN, M.C., M.A., D.C.L. Third Edition, Revised and Enlarged. Oxford: Clarendon Press, 1939. **21s.** net.

Dr. Allen's book has rapidly established itself as a classic, and every student of jurisprudence will have eagerly expected a new edition, after an interval of nine years, which certainly were full enough of developments of juristic significance. Their expectations will not have been disappointed. The new edition represents in every respect the model of what a new edition should be: revised in essential features as well as in detail, carefully noting and discussing every criticism of weight made against views or statements of the last edition, provided, on almost every page, with a wealth of new material, the new edition is, in many ways, a new book, while it retains all the features which made its fame in the first place: a wealth of ideas, profundity of discussion, lucidity of exposition, and, one should add, a modesty in the proposition of views which does credit to the distinguished author.

The best thing to do, for a reviewer of the new edition, is probably to go over the major additions made. They are a completely new introduction on modern tendencies in jurisprudence—the most important one—considerable additions to the chapter on precedents, both historical and on the modern operation of precedent as a factor in the making of law; a short new section on the "equity of a statute"; an excursus on "custom as law" (a reply to a criticism by Professor Dewey); and a very weighty excursus on statutory interpretation. The present reviewer cannot hope to do justice to all or even most of these additions. He must confine himself to some observations on the most important. His gravest doubt, he confesses

and with the greatest respect, is as to Dr. Allen's furtive excursion realm of legal theory. Not that he would not be as qualified as any g author to write on this subject. Nor that there is not a very great ed for some systematic introduction to the subject, particularly for nglish students. But even Dr. Allen cannot do the impossible and do justice to the subject in an introduction of 60 pages. This introduction introduces a certain foreign element into a book which is not only mainly concerned with a different aspect of jurisprudence, but above all deals with it with a profundity of learning, and a wealth of material and discussion which has fully justified its great reputation. The introduction is on a different level. It is necessarily summary and generalising. On some of the authors discussed, like the Historical School and Duguit, Dr. Allen gives a full exposition and important criticism in other parts of the book. As for the remainder, the present reviewer would consider the brilliant analysis and criticism of the "Pure Theory of Law" as the most successful chapter, while he would consider the treatment of Stammler, with the greatest respect, as inadequate. Contrary to his usual method, Dr. Allen does not give, the background of Stammler's theory, which is, however, indispensable (in fact, Stammler is incomprehensible without his neo-Kantian basis) nor does he make us see, again contrary to his usual method, what Stammler really meant with his idea of "right Law." Yet Stammler devoted a very considerable part of his work to the application of his theories to the German Civil Law. It would have shown how much Stammler's social ideal, presented in very formal terms, approximates the "balancing of interests" of the sociological school (the account of which mentions neither Holmes nor Cardozo), and how both eventually reduce themselves to certain social and political valuations, which the term of "balancing of interests" merely conceals. That would have provided a transition to what Dr. Allen styles "ideological" jurisprudence, which replaces this attitude of more or less genuine neutrality by a definite hierarchy of values. Perhaps this would have induced Dr. Allen to devote some more attention to this modern trend of ideological or political jurisprudence. Little as Dr. Allen may think of it, it is swaying at present a great part of the world and forms one of the major issues in the present struggle for basic values of civilisation. At the same time some such treatment might have linked up with and thrown some more light upon the admirable addition which Dr. Allen makes in the new edition, by his excursus on statutory interpretation, and, in particular, the problem of social and political valuations in judicial interpretation of statutes. The essential problems which face the modern lawyer, are so very similar, despite the often exaggerated difference between the Continental and the Anglo-American systems. To these criticisms Dr. Allen might reply that there was no space for all this in 60 pages. Our retort to this would be that for this very reason we wish that the introduction, despite its many valuable features had not been added; for Dr. Allen's book, in its main part, comes as near as humanly possible, to exhaustive, learned and original completeness, and the introduction is, in this respect, on a different level.

One of the most admirable features of the book is the abandonment, by the author, of the purely analytical method, not in favour of any other particular school, but in favour of an evenly balanced consideration of the many other factors which contribute to the making of law. The author also repeatedly shows his conviction that initial assumptions must be

separated from logical deductions (this is the principal significa Kelsen's "Grundnorm," to which the author does not, perhaps, justice) and that much clarifies the discussion about the legal for custom. In his admirable additions to the modern working of preced and the new excursus on statutory interpretation, Dr. Allen deals ful (perhaps with a certain amount of avoidable repetition) with the many grave problems that confront the modern judge. He does full justice to the influence of considerations of social policy and justice which contribute to modern decisions, but he might perhaps have analysed a little more fully how modern judges (in particular the House of Lords in recent years), without breaking with precedent, select and interpret precedents in such a way as to leave the road clear for the result which they think socially desirable. And how else could the precedent system have withstood the terrific pressure of new social conditions? *Donoghue* v. *Stevenson* has always seemed to the present reviewer particularly much in point. It does, in fact, represent a judicial outlook radically different from the earlier cases which the learned Lords reviewed. The way in which they were distinguished, is hardly convincing from a logical point of view, but the decision essentially establishes a landmark in the distribution of social responsibility. Recent decisions on the scope of common employment, especially Lord Wright's judgments reveal clearly the tendency to deal with precedent, to the utmost stretch of logic, with an eye upon the justice of the case. On the other hand, Dr. Allen deals perhaps too sweepingly with the views put forward by Dr. Jennings, Professor Laski and others about the influence of prejudice in judicial interpretation of statutes (p. 436). No less a judge than Lord Justice Scrutton—the last man to be suspected of sweeping assertions or revolutionary views—has revealed the extent to which judges may be influenced by their prejudices (*Cambridge Law Journal*, Vol. I, pp. 1 *et seq.*) Some comparative observations on judicial interpretations of the American Constitution would further add to the value of this chapter.

On the position of subordinate legislation Dr. Allen has definite views which gain added importance in the light of recent developments. He stresses with renewed emphasis the need for a scientific administrative law to replace the present chaos. Scientific consistency is also his main recommendation for the application of precedent and the interpretation of statutes. But no scientific system can ever be conceived without certain basic social values, from which it is derived. The concealment of these values, conscious or unconscious, has often enough prevented clear insight. No system of law is perhaps faced with greater problems to-day than the English legal system. Will it be able to preserve that continuity of evolution which it has upheld through centuries of great political and social changes? Dr. Allen approaches these problems with what one might call the outlook of an open-minded and progressive conservative. While criticising much that is illogical, or obstructive in the attitude of the judiciary towards the interpretation of statutes, and in particular the frequent tendency to interpret a statute not in the light of its purpose, but with some rigid common law technique—a criticism endorsed, for example, by Lord Wright in *Rose* v. *Ford*, [1937] A.C. 826, Dr. Allen believes in the essential soundness of the English precedent system, as long as it is tempered with the liberal spirit of the great judges, and he thinks that it will continue to be an adequate instrument for the evolution of law, accompanied by the "steady if measured stride" of legislation.

wonders what influence the social developments hastened if not d by the present war will have upon the steadiness of the evolution. tremendous increase of legislation, as an expression of growing state ntrol, the further spread of executive as against parliamentary power, he threat to many fundamental rights of the Common Law, through the continuous increase of planning and collectivisation, and, with it the growth of administrative at the expense of the private law which was the sphere of the Common Law, all these factors will affect the development of English Law more powerfully than anything previously known. It is idle to speculate on the future. No one who has studied this admirable work can fail to be aware of the essential issues.

W. FRIEDMANN.

MONEY IN THE LAW. By ARTHUR NUSSBAUM. Chicago: The Foundation Press, Inc., 1939; pp. xxxvii + 543; **$7.50.**

When Professor Nussbaum's book, *Das Geld in Theorie und Praxis des deutschen und ausländischen Rechts*, appeared in 1925, it had an immediate success, because at that time there was no treatise which could serve as a reliable guide through the mass of legal problems brought about on the Continent by the monetary chaos of the post-war period. It was, it is believed, translated into the Spanish language, and although, subsequently, the books of Mater (1925) and Ascarelli (1928) appeared in France and Italy respectively, it retained its value as the indispensable starting point for any further research work on monetary questions. But the learned author who, it is no exaggeration to say, is probably the foremost authority on that important, but somewhat neglected part of the law, did not remain idle and when the depreciation of sterling in 1931, the abrogation of the gold clause in the United States of America and many other countries and the introduction of exchange restrictions in so many parts of the world gave rise to numerous new problems, Professor Nussbaum, now enjoying the leisure secured by the Columbia University's hospitality, set out to re-write and re-edit his book. Incorporating a number of preparatory articles such as "La Clause d'or," *Recueil des Cours*, 43 (1935) 559; "The Gold Clause," 44 (1934), *Yale L. J.* 53; "Basic Monetary Conceptions in Law," 35 (1937), *Mich. L.R.* 865; "The Law of the Dollar," 37 (1937), *Col. L.R.* 1057; "Multiple Currency and Index Clauses," 84 (1935), *Pennsylvania L.R.* 569, and adding much further material, he has now presented his new work to the Anglo-American world.

Having regard to the distinguished author's record it is hardly necessary to say that its richness of thought and material is bound to secure to this book a leading place in the legal literature of all nations. There is no monetary problem which is not dealt with, and even such somewhat remote matters as Bank Deposits or usury laws are included. There is hardly a decision of any Court, however inferior and unrepresentative it may be, and not much legal literature which is not dutifully collected, though one cannot help feeling that such writers as Martin Wolff, Rabel, Neumeyer, Piret have received less than the author's full attention. Nor is there any paragraph where the views propounded will not be found stimulating, original and, very often, attractive.

In his Preface Nussbaum states that his work "aims at analyzing and determining the universal principles that underlie the law of money. Use of the comparative method is indicated for that purpose. . . . The view

is taken that the basic monetary problems of developed economic s are substantially the same throughout the world." Nobody will find with this programme. But it involves dangers which have not been ent avoided. Thus his search for the "universal principles" has very frequen led the author to refrain from making it clear whether his statement applie to one legal system or to all laws, and to make it appear that a rule or a decision obtaining in a particular country has universal validity. The same method probably accounts for the surprising lack of differentiation between private international law and municipal law or for the often indiscriminate use of cases relating to foreign currency for the purpose of establishing points concerning the domestic money and *vice versa*, or for the free criticism of foreign rules of law which a lawyer writing from the standpoint of a particular legal system should avoid but which a writer aiming at alleged universal principles is only too apt to allow himself. The latter point is also due to another object which in the Preface is explained as the "search into the attitudes of the judiciaries of the leading countries in monetary questions; controversies which, because of their social and political consequences, present tests of the competence and impartiality of the courts. In this sense the present study may be said to constitute a comparative inquiry into justice as well as into law." This attempt produces such remarks as that the House of Lords' decision in *Banco de Portugal* v. *Waterlow & Sons*, [1932] A.C. 452, "is a splendid example of entire impartiality; as such, it is, perhaps, even more gratifying than a judgment which is only juridically correct," or that the Court of Appeal when it applied English law in *International Trustee for the Protection of Bondholders* v. *The King*, [1937] A.C. 500, set "another example of judicial straightforwardness in a very tempting situation," while "over-emphasis on the pledge-clause . . . enabled the House of Lords to avoid the disadvantages which would possibly have resulted in the future had they placed their decision on broader legal grounds."

It would be disparaging to attempt to deal in a review of a really momentous work with matters of detail (such as the frequently perplexing arrangement or the misleading quotation of decisions in support of contentions which, on examination, they do not appear to establish at all, or the occasional vagueness of language or the inclination to generalise) or to quarrel with the author's carefully considered opinions. For those who know his previous writings it may be sufficient to say that in respect of all questions of fundamental importance he has remained true to his established methods and principles. We find the definition, if definition it be, that money is "a thing which, irrespective of its composition, is by common usage treated as a fraction, integer or multiple of an ideal unit" (p. 5). There is still the obscure phrase that "the essence of nominalism consists in the arithmetical relationship of a given money to the pertinent ideal unit (dollar, franc, etc.)" (p. 16), and also the really untenable doctrine that "it is ultimately society and custom that decide whether coin and paper will function as, and so be (*sic*!) money" (p. 28). The existence of adaptable debts (p. 255) is still alleged nor has the author given up the fight against the "Tantalus interpretation" of gold clauses which refuses to include a gold value clause into every gold coin clause (pp. 351 sqq.).

But the probably larger group of those who, particularly in this country and in America, have hitherto regarded money as a fact rather than a legal problem and are not acquainted with writings on the law of money, can only be recommended to study a work which is bound to

[redacted] with admiration and which, if read with a good deal of criticism [redacted]ercise a wholesome influence on legal thought, promote useful dis-[redacted]ons of monetary problems and even provoke some much-needed [redacted]nges in the law. Like this reviewer, every reader will gratefully acknow-[redacted]dge the debt which all students of the law of money owe to a much [redacted]espected master.

F. A. MANN.

THE LAW OF THE CONSTITUTION. By A. V. DICEY, K.C., Hon. D.C.L. Ninth Edition, by E. C. S. WADE, M.A., LL.D. 156 + 681 pp. Macmillan & Co. **15s.** net.[1]

The first question which must be faced in reviewing this new edition of Dicey is whether new editions of such accepted classics are advisable. The balance of the Constitution, as Dicey saw it, is gone. It was going rapidly, even so long ago as 1914, when the eighth edition, prepared by the author himself, was completed. To-day, therefore, Dicey belongs rather to constitutional history than to constitutional law, and the student's main difficulty, in dealing with this excellent edition, is to grasp how much of Dicey's edifice, even when reinforced by some magnificent underpinning by Dr. Wade, remains. The student's task will be by no means easy, for Dr. Wade's Introduction runs to 156 pages, and is so concise that it might well have been twice that length. The distinguished editor has been too modest. He could have written a book worthy to stand beside Dicey's—as mature and as scholarly, instead of concealing himself behind the covers of what will always remain a notable edition. We have had Dicey—and Dr. Jennings' audacious assaults upon him; and Dr. Wade, with his effortless style which reflects deep thought, would have restored the balance.

The first edition of Dicey appeared in 1885. The eighth was printed in 1914, although published in the following year, and now Dr. Wade's edition is dated 1939. There is a notable coincidence in the last two dates. Dicey had been uneasy about the rule of law for some time prior to the eighth edition, as Dr. Wade shows in his preface. The war of 1914–1918 dealt it a blow from which it failed to recover. Dr. Wade's "Introduction" not only shows how far the constitution has changed since then, but an awareness of how very much further it may be compelled to change. Already it is plain that it can never be again what it was when this edition was published. Let us hope that future developments will reflect the tolerance and love of liberty which both author and editor possess in such liberal measure. Our constitutional settlements in the past have been due to a capacity to avoid extremes, and to an attachment to real values, as distinct from abstract logic. We are going to need both in the near future.

There are many memorable pieces of incisive reasoning and concise statement in this Introduction—and there is no spurious optimism. "The price paid by Coke and his followers for their alliance with Parliament, which ensured the defeat of the Crown's claim to rule by prerogative, was that the common law could be changed by Parliament, but by Parliament alone" (p. lxix). A good deal of constitutional history is summed up in that short statement, and one regrets that Dr. Wade had not more space at his disposal to consider more fully Coke's part in the struggle against the

[1] Dr. Jennings will contribute a review on the same book in the next number.

prerogative. Similarly, the editor's observations on feudalism particular point at a time when many nebulous theories of federal ass tions are current. Have the enthusiasts realised that any adhesion this country to a federation would almost certainly necessitate a writt constitution, and would obviously destroy the sovereignty of Parliament It may well be that these things are desirable in themselves, but their achievement would imply vast changes. On the other hand "the advent by constitutional means of the totalitarian State can be more readily achieved by a Parliament which has power to destroy as well as to create the whole framework of government by a simple Act or series of Acts" (p. lvii). Yet at the same time the existence of the federal constitution may prevent the achievement of reforms which are overdue, or which may be necessary to avert a national disaster. Haunted alike by the threats of a constitutional dictatorship and by a federation of powerful interests, we at present walk uncertainly, but with increased watchfulness.

Another point on which the Editor comments acutely is the identification of the interests of one party with those of the State, the necessary result of which is that opposition is deprived of its proper status, and is adroitly exhibited as something merely factious. It may be that in the long run this will do more to undermine the stability of our constitution than any other single factor.

There are many other illuminating and terse summaries of present tendencies upon which much could be said; but the conclusion remains that Dicey has been fortunate in his editor.

G. W. KEETON.

ARNOULD ON MARINE INSURANCE. Twelfth Edition by R. I. SIMEY and G. R. MITCHISON. Pp. xcix + 1936 (with index), two vols. London: Stevens & Sons, Ltd. **£5** net.

It is fifteen years since the Eleventh Edition of Arnould appeared; too long a gap, since this is the only authoritative work on the English law of marine insurance. Mr. Mitchison joins Mr. Simey who had for so many editions collaborated with the late Mr. de Hart. The new editor is well equipped for his task both by practical experience of the administration of the law, and grasp of the principles of this branch of insurance. Judged by conventional standards the work done upon the new edition is of a high order. Those aspects of the subject which have been particularly discussed in the Courts such as constructive total loss of freight, and deviation receive careful treatment, though the editors drily remark in their preface that "much uncertainty still exists" on these topics. Certain practical matters have received attention, and space has been found for many of the Rules of the Institute of London Underwriters in accordance with which the bulk of modern marine insurance is underwritten, the neglect of which was a serious omission from earlier editions. Every relevant case and statute appears to have been noted up.

Could anything more have been asked? Frankly we should like a new book, or a fundamental rewriting of the old one. For the period of its appearance (1848), Arnould was a really remarkable book. The author who was a fellow of his college and became a judge in India had an unusual interest in comparative jurisprudence, and carried on the tradition of learning which had been established for the law merchant by Lord Mansfield. His bibliography contains a reference to every continental and

[redacted]an work of note which had appeared in 1848. To judge by the [redacted]tions made by the successive editors no works of any importance [redacted]ting to this subject have been published on the Continent since that [redacted]me! But while Arnould's achievement was a remarkable one, one which has been considered good enough for practitioners ever since, it was conditioned by the state in which legal science found itself at that time. No really scientific analysis of the concepts of contract law had been made, and the jurisprudential basis for really first-class textbooks was lacking. Since then the whole subject has been revolutionised by the work of Pollock, Anson and Salmond in this country, as well as well-known authorities in the U.S.A. But all this has passed over the heads of successive editors of Arnould. To take one and an important example the subject of misrepresentation is one of great importance in marine insurance which at an early stage developed some rules of its own on the subject. It has never been clear how far these are still valid in the light of the modern doctrine laid down in *Derry* v. *Peek* (1889), 14 App. Cas. 337. The whole subject would repay careful analysis, but there is only a casual reference to that famous case in a footnote, and while the editors appreciate that the early rules are not perhaps in accord with modern ideas no real attempt is made to restate the law in accordance with present day doctrine.

The importance of the Institute Clauses has already been referred to. The history of these clauses is of great interest, and they mark perhaps the most important development in modern marine insurance. No writer sitting down to prepare a treatise on the subject could fail to devote much attention to their elucidation and to an explanation of the part which they play in present-day law and practice. But in Arnould they are very much taken for granted. Less than half a page is devoted to showing how they came to be in, or on, the Lloyd's policy, and while those that have been the subject of judicial decisions are referred to here and there in the text there is no attempt at a systematic exposition of the scheme of the different groups of clauses, nor to relate them scientifically to the body of the policy.

The immense learning contained within the covers of Arnould makes it unlikely that it will be superseded, and this century-old textbook will probably go on to its bicentenary. It has become a sort of vested interest, and one which will always have its value. Yet how much one could wish for a new scientific treatise on marine insurance written with the knowledge and outlook of 1940.

R. S. T. C.

FUNDAMENTAL PRINCIPLES OF TAXATION IN THE LIGHT OF MODERN DEVELOPMENT. By Sir Josiah Stamp. Macmillan & Co. Ltd. 1937. 215 pages. **10s. 6d.**

This book, a new and revised edition of a series of lectures, first published by the author in 1921, is written in that plain style which is expected of Sir Josiah but which at times is so concise and laconic as to be almost obscure. Generally, however, the book is capable of understanding even by lawyers who have no special knowledge of the effects of taxation on the individual, the state and the community.

Quoting Adam Smith's four fundamental principles of taxation the author observes that while they are indisputable they are inadequate in

the light of recent experience. One at least the present reviewer is obliged to repeat: "the tax which each individual is bound to pay to be certain and not arbitrary. The time of payment, the manne payment, the quantity to be paid, ought all to be plain and clear to contributor and to every other person." Having regard to some rece efforts of the Legislature in successfully preventing the creation of th "educational trust" for children (Finance Act, 1936, sect. 21) we wish that Sir Josiah had directed some space to the problems created for the taxpayer by the intricacy of the Finance Acts. But perhaps the words used to make taxation part of the law are not his concern; he deals rather with methods of taxation, showing by a diverse range of examples how different taxes have had quite different results from those intended, how through experience Government, so it seems at least in England, is in a far better position than is thought, to estimate just what effect a new tax or an increase in tax will have on the community, how some taxes hamper or assist Government in its task of finding money and how they advance or retard economic progress.

It becomes more and more obvious that the economic organisation of a country is a matter which cannot be left to the free play of demand and supply, and that so long as governments decide on a large measure of state spending, taxation will play an increasing part in the national life. That makes it necessary for lawyers to consider problems in the solution of which Sir Josiah's book may give them some assistance.

S. H. E. BURLEY.

WHARTON'S LAW LEXICON. Fourteenth Edition by A. S. OPPÉ. *Barrister-at-Law*, London. Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1938. **£2 10s.** net.

OSBORN'S LAW DICTIONARY. Second Edition. By P. G. OSBORN, LL.B., *Barrister-at-Law*, London. Sweet & Maxwell, Ltd. 1937. **15s.** net.

New editions of these two well-known law dictionaries have appeared almost simultaneously. Wharton's is by far the more ambitious, voluminous and expensive of the two. It claims to be not only a dictionary, but an Epitome of the Laws of England under Statute and Case Law. The former task it fulfils admirably, giving as it does an immense number of titles not only from English, but also from Civil, Scots and Indian Law. The latter task, however, it fulfils in an uneven, and, to some extent, inadequate manner. There appears, on the whole, to be a distinct superiority of the titles dealing with the Chancery side over those dealing with the Common Law side. The titles on Real Property, which had to be entirely rewritten since the last edition, owing to the new legislation, are clear, accurate and as complete as possible within such limited space. But on the Common Law side there are some remarkable errors. Under Negligence it is suggested that the division between gross, ordinary, and slight negligence would be a good classification (for English Law!). The selection of decisions quoted in this and many other titles is very questionable. One source of weakness is that in titles which comprise Civil and English Law (e.g. Hire) there is no clear indication what is part of the one and what of the other. The title on "Quasi-Contract," consisting of two

s misleading and the titles on "Conflict of Laws" and "Renvoi" comprehensible. The task of mastering material of such diversity is nigh insoluble for any one man. The shortcomings in some parts should lead the reader to underrate the wonderful achievement of the whole. ut it is submitted that Wharton's might gain in value by ceasing to be an Epitome of English Law as well as a dictionary. Few people are likely to turn to a Law Dictionary for the former purpose, and it is hardly possible to give an adequate all round epitome in the available space. If, however, the present scope is maintained, it might be suggested, with all respect to the learning of the editor, that, for certain matters which require special knowledge, such as Conflict of Laws, the co-operation of experts should be secured.

Osborn's much less ambitious attempt has quickly won well-deserved recognition. It does not claim to give more than a definition and explanation of legal words and phrases, and it does that very well. The author in the preface apologises for having to omit most of the summaries of leading cases which appeared in the first edition, in order to make room for many additional titles and additions to existing ones. This appears to be all to the good. Other works give leading cases, and this is hardly a task which could be fulfilled by a law dictionary without prejudice to its proper function. It is, of course, only fair to say that Wharton's contains a great number of titles, especially of historical importance, for which there is no room in Osborn's.

Thus, both dictionaries fulfil their distinct purposes, and thanks are due to the editors for their labours which must be as painstaking as they certainly are useful to students, research workers and practitioners.

W. FRIEDMANN.

GIBSONS PROBATE LAW. Thirteenth Edition. By A. WELDON, H. G. RIVINGTON, and L. C. WARMINGTON. ix + 180 pp. **15s.**

GIBSONS DIVORCE LAW. Revised Thirteenth Edition. By A. WELDON and L. C. WARMINGTON. iii + 269 pp. **15s.**

Gibson's Probate and Divorce has in its thirteenth edition disintegrated into its component parts with great profit except to the student who has to expend fifteen shillings on each of two slender volumes. The most radical changes occur, of course, in the Divorce Law. The thirteenth edition appeared before the Matrimonial Causes Rules, 1937, had been published and the whole edition was withdrawn for revision. As so revised the text is completely up to date incorporating all the changes brought about by the Act and Rules of 1937. The treatment of the subject is rather more detailed than in the earlier editions, having regard to the greater importance given to Divorce as an examination subject in the New Syllabus for the Solicitors' Examinations. The learned authors have pointed out the many difficulties in the new law and have given valuable guidance as to the probable solution of these difficulties.

By contrast the Probate Law has needed very little revision and the authors have contented themselves with incorporating a few cases which have been reported since the last edition.

E. WYNDHAM WHITE.

REVERSION CONVEYANCING PRACTICE AND LAW. By A. V. K
London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. p
+ 367. **30s.** net.

This is not a work of immense erudition such as *Withers on Reversion* but is designed to assist solicitors in all matters of conveyancing practic relating to policies of assurance and to reversions and other interests under wills and settlements. It consists of various precedents of questionnaires and correspondence with detailed notes, the preparation of which has obviously required a great deal of careful work upon which the author deserves congratulation. The result is a book which should prove useful to solicitors when dealing with this extremely difficult branch of practice. Happily the nature of the work gives little scope for the excessively racy literary style in which the author indulges in the introduction and which is quite unsuited to a legal textbook.

DEATH DUTIES FOR STUDENTS. By G. M. GREEN, LL.B. (London). Assisted by B. L. PURKIS. London: Butterworth & Co. (Publishers), Ltd. pp. xix + 166 W (11). **7s. 6d.** net.

The need has long been felt for an elementary introduction to this extremely difficult, extensive and intricate subject. This need has become particularly acute in view of the increased importance placed upon the subject by the new regulations for the Solicitors' Final Examinations, and happily it has been satisfied by this admirable little book. In it the student will find a clear and readable account of general principles and a short summary or an indication of the existence of the less important or more specialised rules and exceptions. Not only will it give him all he requires for the purposes of the Solicitors' Final Examination (for which it is a recommended textbook), but if he has mastered the general principles which it expounds he should be far better qualified than previous generations of lawyers to grapple in practice with the highly technical and obscure statutory provisions and the cases interpreting them with which he will have to deal almost every day. The profession are indebted to the learned authors for writing this book and for writing it so well. It is suggested, however, that when a second edition is required the authors should improve the index which is inadequate.

COMPANY LAW. By ALBERT CREW. Fourth Edition, 1938, by the AUTHOR and W. G. H. COOK, LL.D. (Lond.). London: Butterworth & Co. (Publishers), Ltd. pp. xxv + 374 W (39). **7s. 6d.** net.

This book is primarily intended to supplement the law lectures which business men and commercial students attend for the purpose of preparing for the various professional or public examinations in Company Law. It consists of the annotated texts in full of the Companies Acts, 1929, and of the various Companies Clauses Acts, with notes and definitions of terms and an appendix of specimen examination questions. The beginner who attempts to use it as an elementary textbook is to be pitied for he will undoubtedly suffer the acutest pains of mental indigestion. But it doubtless proves useful as a supplement, for it certainly contains an immense amount of information in a cheap and convenient form.

L. C. B. GOWER.

AL SURVEY OF ENGLISH LAW. 1938. By the DEPARTMENTS OF LAW AND INTERNATIONAL STUDIES OF THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE. Published for the London School of Economics and Political Science by Sweet & Maxwell. 1939. Price **10s. 6d.**

If the Annual Survey did not exist, it would certainly have to be invented. Students and teachers and, one must hope, practitioners alike can hardly do without this excellent, comprehensive and always interesting survey of every branch of law. That is, provided the right use is made of it, not as a substitute for the reading of cases and literature, but as a first guide and reference book of invariable reliability. But the Survey has gradually developed beyond a reference compilation. There is more and more an element of cautious, but nevertheless effective criticism, where the author of the section deems it necessary. The extent and vigour of the criticism varies in the different sections, but, to take only one example, the well justified criticism of the very weak decision in *Daniels* v. *White & Tarbard* (p. 190) in the section on Tort is exhaustive despite its brevity. We hope for many more volumes of the Annual Survey.

TABELLEN ZUM INTERNATIONALEN WARENZEICHENRECHT. Vol. V. Edited by Justizrat DR. MAGNUS. Verlag Rohrer. Bruenn, 1938.

The present volume is the fifth of a very remarkable series of works compiling the law of all countries on various branches of the law. Under uniform headings, the law is set out, in the form of tables, concisely, but nevertheless in great detail, for every country, in alphabetical order. It is thus possible to find out, within a few moments, whether and in what form it is possible to assign trade marks in Canada or Spain or anywhere. Work of such kind demands infinite energy, organisation, patience, knowledge and a great amount of international collaboration. Dr. Magnus, in this, as in previous volumes, has succeeded in all these requirements, and he has secured the collaboration of distinguished lawyers from all over the world. Science and practice of International and Comparative Law owe him a debt of gratitude. It is sad to reflect that, first the Nazi regime in Germany, and now the war in general have probably brought this highly important work to a temporary end. A world which wants to rebuild international contacts and relations will need works like these in the necessary task of simplifying and, to some extent, unifying international legal relations. Previous volumes of this series, especially those on International Civil Procedure, Copyright and the Law of Nationality, will be no less useful than the present one, and, it is hoped, be translated or re-edited in English.

The present volume appears to be very carefully done. One point of arrangement: One cannot understand why Canada should have been separated from the other Dominions and thus treated as if she had no connection with the British Commonwealth of Nations.

KEITH ON CONSTITUTIONAL LAW. 7th edition of Ridges' *Constitutional Law*, by A. BERRIEDALE KEITH, D.C.L. London: Stevens & Son, 1939. Price **25s.** net.

The new edition follows very closely upon the sixth, and, owing to further changes, Professor Keith has now substituted himself as the

author for the original author. Certainly every work of importa bound to be impressed more and more, in successive editions, wit personality of the editor, and whatever policy the editor may adop regard to preserving the name of the original author, it is no use tryi to superimpose glosses upon the original work. The unfortunate metho adopted in the ninth edition of Salmond's *Jurisprudence* shows this, in contrast to the opposite method adopted by Dr. Stallybrass in Salmond's *Torts* and by the present author.

The present edition makes Keith the most up-to date of the textbooks on Constitutional Law. For the internal British Constitutional Law many students might prefer Wade and Phillips, and, for certain general problems, Wade's new edition of Dicey's *Law of the Constitution*. But for a detailed and accurate account of the constitutional law of the British Empire as a whole, Keith is indispensable. And this is certainly a point of particular interest at the present time. In a long preface, the author gives a brief account of important constitutional events up to June, 1939. He many of them in the light of his personal convictions, alth is more tempered than in the same author's "Cabinet." I almost impossible for any author to interpret Constitutional ally in a critical period, without a political bias of one sort With Professor Keith one always knows where he stands, an preferable to the disguised political bias of other authors.

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THE FRENCH CONSEIL D'ETAT[1]

GREAT BRITAIN and France, so united in their aspirations, so near to each other in their constitutional and political life, profoundly differ in their administrative organisation.

The Conseil d'Etat, heir of the Conseil du Roi, assists the Government in the direction and control of French administration. It is, at the same time, the supreme tribunal in matters of administrative litigation. There is no comparable institution in Great Britain.

The Conseil d'Etat is the symbol of the centralisation and administrative power which, since the advent of absolute monarchy and especially since the Consulate, have characterised French institutions. England has a common law, to which the state is subject, and which the courts apply according to general and uniform principles. In France, the state and the public services are also subject to the law, but it is a special and autonomous law, which has its own principles, distinct and independent from private law. It is public or administrative law which governs the relations of public administration and individuals, as well as those between the various departments of administration. Whereas, in England, the law is entirely in the hands of the administration of justice, in France there is, between the law and the citizen, a powerful administration which is entirely

[1] A lecture delivered in the University of London, November, 1939. Translated by W. Friedmann.

independent of the organs of justice, that is an autonom
creative administrative power, which directly executes th
and compels the citizen to respect it. The administration ha
right to take decisions, to give orders. These decisions must
obeyed. Administrative decisions have a validity equal
of judicial decisions. One might even say that, u
they have superior force, since it is the administr
enforces and carries out the decisions of courts of l

The autonomous power of the administration ma ril, 1940
in different ways—

1. Through general regulations. By exercising the power inde-
make rules and regulations, the administration collaborates with ate,
the legislature, and it becomes a veritable secondary legislator,
entrusted with the completion of the law and with the issue of
general, impersonal and obligatory regulations, like the law itself.

2. The administration charges itself with the official enforce-
ment of the law, when the law has not determined its own sanc-
tion; this is a matter of mere material enforcement, *manu militari*, recognised as indispensable by administrative juris-
prudence, if authority is to remain with the law.

3. The administration finally manifests itself by individual
administrative acts, by which it makes the law tangible for every
citizen and compels him to carry out the obligations imposed by
the law.

To sum up, then, the exercise of administrative power is a direct, swift and, to some extent, discretionary way of assuring the execution of the law, and to compel the obedience of the citizen. It is an essentially French procedure, the origins and causes of which it is worth investigating.

The existence, in France, of a powerful autonomous administration, is due to historical and political reasons.

The kings of France have been compelled, throughout the centuries, to keep together their territories and peoples and to forge them into national unity. They have done that, in a continuous struggle, and in spite of recurrent obstacles put in their way by their continental enemies. This work, carried out in war, demanded swift instruments of command and authority; only an autonomous and centralised administration could supply them; that is why we see it appearing at a very early stage in the history of the monarchy. The situation remained unchanged after the Revolution. First, the necessity for the First Consul to restore the French nation after the disorders of the period from 1790 to 1800, and then, from Napoleon to our own days, the

[redacted] for France to defend its integrity against too powerful [redacted]ours, has obliged us to maintain a military régime, which [redacted]onceivable without a strong and centralised administration, arising [redacted]out an administrative power capable of rapid action and direct actio[redacted]mmand. In general, the danger of war which obliges threatened pa[redacted]nations to take military measures, also constrains them to adopt r[redacted] more or less an administrative régime.

We can now understand the place which the Conseil d'Etat occupies among French institutions. The government is the supreme head of the administration. The Conseil d'Etat assists it permanently in its function of directing administration. Further, since government and administration, whatever their power, are always bound to act in conformity with the law, the Conseil d'Etat watches, as the supreme organ of administrative jurisdiction, over the legality of their actions.

A few words about the composition of the Conseil d'Etat. At present the Conseil d'Etat is composed of: forty-two State Councillors on ordinary service, of whom one is the Vice-President and five are Presidents of the sections; forty-three Masters of Request (*Maîtres des Requêtes*); twenty-five Auditors of the First Class; fifteen Auditors of the Second Class. Altogether it has 125 members, whose ages are between twenty-two and seventy-one. The Auditors of the Second Class are appointed by competition; the Auditors of the First Class are chosen from those of the second class; of the Masters three-quarters are chosen from the Auditors of the First Class, and one-quarter from external officials who have held office for at least ten years; of the Councillors two-thirds are chosen from the Masters, and one-third from personalities outside the Conseil who are at least forty years of age.

The Minister of Justice, as Garde des Sceaux, is President of the Conseil. But this is only an honorary function, never exercised in fact. The actual President is the Vice-President.

The ministers have also access to the Conseil, in order to discuss the affairs of their departments. But in practice ministers never participate in the sittings. On the other hand, thirty-one high officials, usually taken from the heads of departments of the ministries, are permanently accredited to the Conseil d'Etat. They are the councillors on extraordinary service. They represent the ministers and deliberate with the members of the Conseil about the matters concerning their respective departments. The Minister of Justice, the other ministers and the councillors on extraordinary service have, however, access only to the administrative sections and to the General Administrative Assembly;

they can never sit in the litigation section. They remain a[redacted]ril, 1940
trators. The law forbids them to be judges, since, by their[redacted]
tion, they would be judges in their own cause.

The Conseil d'Etat has five sections, one section for matte[redacted] the
of litigation, which forms the Supreme Administrative Tribuna[redacted]lity
and four administrative sections, for the Interior, for Finance,[redacted]
for Public Works, for Labour. To each of these sections there[redacted]l
corresponds a group of ministries. The General Administrative
Assembly, which consists of all the members of the Conseil,
meets every week to settle the most important matters, after
they have been studied by the sections. The less important
matters are handled by the sections alone.

As for the functions of the Conseil d'Etat, they fall under
three principal categories, namely legislative, administrative and
judicial functions.

Legislative Functions

The law of 24th May, 1872, which still determines the status of the Conseil, intended to make the Conseil collaborate in the legislative work of the Government and of the Houses of Parliament. It says that legislative proposals due to parliamentary initiative may be submitted for advice to the Conseil, either by the Government itself, or by request of Parliament. The authors of the law of 1872 remembered the considerable part which the Conseil d'Etat of Napoleon had played in the preparation of laws during the consular period, and the memorable discussion of the Code Civil under the personal inspiration of the First Consul. They thought that the Conseil of the Third Republic might come to render similar services, less spectacular perhaps, but not less efficient. They thought that the members of legislative assemblies, apt to express general ideas in their proposals, lacked the faculty of clear formulation, and of harmonising the new laws with pre-existing legislation. They meant to reserve the initiative to the Government and Legislature, but the care of legislative technique to the jurists of the Conseil d'Etat.

Their expectations have not been realised. No collaboration has been established between Parliament and Conseil d'Etat in the preparation of statutes. The text of the law has, in this respect, remained a dead letter. I do not know of a single legislative project that has been submitted to the Conseil for examination and advice since 1872. But this should not surprise us. Times have changed since the Consulate. Under the Consulate, the personality of the First Consul dominated the direction of

affairs. The legislative body voted laws, but without discussion, so much so that it was called "Corps des muets." The preponderance of the Conseil d'Etat in the legislative work was therefore normal; it resulted from the very relations between the various organs of the state. But since 1875 we have lived under a parliamentary régime, a régime characterised by the omnipotence of the Chambers. Parliament, very sensitive, very convinced of its sovereignty, is jealous of its prerogatives. All the more so, it appears, as it becomes more mediocre in its composition. It will not, therefore, under any circumstances, share its legislative attributes with the Conseil d'Etat, if only for the purpose of a simple opinion or technical preparation. And there is no hope of this attitude being modified.

What is more astonishing is that the Government takes the same attitude, when it receives from the Chambers, in extraordinary circumstances, the right to legislate. In such a case, it would appear that the susceptibility of Parliament is out of the question, since it has momentarily abdicated in favour of the Cabinet. Nothing, therefore, seems to prevent the Government from taking the opinions of the Conseil d'Etat on the important texts which it promulgates on its own authority. But it has never done so. Never has a legislative order been submitted to the Conseil d'Etat. To explain this astonishing fact, I hesitate between two possible explanations. It is possible that the Government, imbued with the spirit of Parliament, might be jealous of its momentary prerogative, and anxious not to share it, however feebly, with its natural advisers. On the other hand, legislative orders, as long as they have not been ratified by Parliament, retain, despite their legislative effect, the character of administrative acts. A plea for their annulation, on the ground of illegality, may therefore be submitted to the Conseil d'Etat, and, in fact, some of them have been annulled by the Conseil for excess of power (*excès de pouvoir*). Perhaps it is not desired that the Conseil, as adviser of the Government, should prepare texts, on which it might be ultimately called to decide as supreme judge. Be that as it may, the legislative function of the Conseil has fallen into desuetude. The best minds agree in regretting this fact. Many statutes are made; their draftsmanship leaves much to be desired. The task of interpreters and tribunals becomes more and more arduous. It seems indispensable that recourse should be had, for the drafting of laws, to men whose knowledge and experience are proved. They are at the Conseil d'Etat. But, in view of political habits, there is no prospect for the Conseil to be associated with legislative work.

Administrative Functions

It was the intention of the reorganisers of the Conseil d'E in 1872, that its administrative functions should occupy the fi place. These functions, to be sure, are very important; but, a we shall see, their importance has been surpassed by that of the juridical functions.

In the exercise of its administrative functions, the Conseil does not make decisions to be executed. It only gives opinions to the Government. The Government is, by law, often obliged to ask the opinion of the Conseil d'Etat. But it is never obliged to follow it. The opinion of the Conseil has therefore only moral force. It offers a guarantee of serious examination—of good administration. But its juridical efficacy is of the feeblest, since the government can always ignore it.

The matters on which the Conseil is asked to give its opinion are many and varied. They are also of very unequal importance. They include essential matters, such as the control of the departments, municipalities, colonies; as the great concessions of public services (transport, electric energy, mines); but also rather insignificant matters, such as the change of names, the clearing of woods, or the obtaining of water from rivers and canals.

There is no point in enumerating all the cases in which the Conseil d'Etat may be asked to give an opinion. Suffice it to say that the Government, in practice, submits a draft decree to the Conseil, that the Conseil examines it, first by its appropriate Section, then, if sufficiently important, by the General Assembly. After that, the project is sent back to the Government with the advice of the Conseil, of which the Government makes such use as it thinks fit, with full liberty of discretion. There is, however, one essential function of the Conseil in administrative matters to which attention should be specially directed: the consent which it is its task to give or withhold to any decrees of public administration made by the Government.

This necessitates some words of explanation on the power to make regulations (*pouvoir réglementaire*). The Constitution of 1875 has given to the President of the Republic the power of making rules to ensure the execution of the law. The President can therefore, on his own, make such rules as he thinks fit, subject only to the necessity of obtaining the consent of the minister concerned. But in one case the President is not free in his decision: that is where the law expressly prescribes that an executory regulation will have to be made. This regulation takes the name of public administration (*règlement d'administration publique*).

s a very frequent case. Most statutes, in fact, contain a lause which says: "A regulation of public administration ll determine the conditions under which this statute will be pp ied."

This clause has two important consequences: The one is that the Presid nt of the Republic and the government are bound to make the r lation thus prescribed; the other that they must take the ad of the Conseil d'Etat. Very often the law merely states princ The administrative regulation fills in the details and matter rocedure, without which the execution of the law would be ve y difficult, perhaps even impossible. In this way, the Conseil d'Etat is therefore directly associated with the measures which ensure the application of the law, both as far as the administration and as far as the citizen are concerned. This is the principal administrative function of the Conseil.

A word should be added about the individual tasks of the members of the Conseil d'Etat. They are logically connected with its administrative functions. These tasks, indeed, are not laid down by the law. They are entrusted to certain members of the Conseil personally, as a matter of custom and tradition. They are authorised by the law regulating the status of the Conseil. They are allotted by the government, which wishes to profit by the knowledge and experience of the members of the Conseil d'Etat in matters of high administration, and in directing the public services. Thus, by a standing tradition, the Heads of the Ministers Cabinets and the Heads of Department in the Ministries are often chosen from the members of the Conseil. Diplomacy, too, has made use of the Conseil d'Etat. Several ambassadors have been taken from its members. Again, numerous extra-parliamentary commissions, formed in the ministries to study certain important problems, are presided over by councillors of the Conseil, and other members of the Conseil—Masters of Requests and Auditors—look after the carrying out of the work undertaken by these committees. Finally, there are, at present, about seventy honorary members of the Conseil d'Etat. Some are retired, others have resigned in order to take up other activities. Some have gone into politics. Not long ago, a prime minister was a former member of the Conseil d'Etat. Several are in the cabinet. About thirty-five honorary members take a leading part in private business: railways, banks, electricity, metallurgy, insurance. The Conseil d'Etat is thus also a reservoir of statesmen, diplomats, administrators, and business men.

Judicial Functions

The function which the Conseil d'Etat exercises as S
Tribunal in administrative matters is one of the most on
and best conceived of the legal and political institutions of Fra
It is the result of a long historical evolution. It marks, in a sense,
the epilogue to a long struggle between Monarchy and Parlia-
ment. It was in order to end this struggle, to free the cen
power from the tutelage which the courts arrogate
selves, that the Constituent Assembly, at the begin
Revolution, decreed a separation of administrative and
power. This was the object of the law of the 16th–24th A
1790, which is still in force. It has a twofold effect. On the
hand, it forbids the judicial authorities to interfere with ad
tration; on the other, it prohibits the decision, by judicial
ities, i.e. the ordinary law courts, of disputes between citi
administrative authorities; whether they be the state, dep
municipalities, colonies; as well as of disputes betwe
administrative authorities. Now the result of this mi
these disputes were altogether exempt from pro
decision, that the administration was judge in its own cause.
This is notably the case in Belgium. But this is a defective
system, repugnant to our Western ideas of justice. We unanim-
ously deny that the state and other public authorities or bodies
should be exempt from the law. If, for historical reasons, French
administration is not subject to the jurisdiction of the ordinary
courts, it must submit to the control of special courts, for the sake
of law and order, and for the protection of liberty. This special
court is the administrative judiciary, of which the Conseil d'Etat
is the essential and supreme organ. The principle of the separ-
ation of administrative and judicial power has therefore, in
France, had the effect, not of freeing the state and public admin-
istration from any law and judicial control, but of subjecting
them to the rules of public law and to the censure of administra-
tive tribunals. This has given excellent results. Administrative
jurisdiction enjoys, in France, the well deserved respect and
confidence of both those who govern and those who are governed.
This juridical function has accordingly developed, under the
Third Republic, into the most important of the functions of the
Conseil d'Etat, leaving far behind, in importance, its adminis-
trative function. The Conseil, reorganised in 1872 principally
to assist the Government in its administrative tasks, has, above
all, become the judge of the Government.

The judicial function of the Conseil has developed into its
cardinal activity, not only by the number of disputes decided,

has multiplied fivefold since 1872, from 1200 decided in 2 to 6000 these last few years, but also by the prestige and thority which the Conseil has thereby acquired. It is much etter known, to the public as well as to experts, by its decisions than by the administrative opinions given to the ministers.

The development of the judicial functions of the Conseil has different causes—

1. First, the great number of statutes passed under the Third Republic, a number increasing every year in alarming measure. These statutes multiply the law, procedure, remedies. They also increasingly interfere with protected interests (notably fiscal laws). Or they affect certain liberties (once such interference was inspired by certain religious principles; to-day it is a matter of restricting freedom of trade and industry). This excess of legislative activity produces a hypertrophy of administrative litigation.

2. The strengthening of administrative power and the development of public services. The needs of national defence on one hand, electoral exigencies and the socialist spirit on the other, have induced the state to invade, since the beginning of this century, practically every sphere, to issue more and more regulations, and to undertake functions of a social and economic character. Thus, numerous public services have been created; numerous matters have been taken from private law and transferred to public law; the governed have thus seen their contacts with public authority multiply and, with them, disputes which call for administrative jurisdiction. It is true that, at the same time, Parliament has passed decentralising statutes, and that it has, in particular, increased the powers of departmental and municipal assemblies. But local authorities are themselves subject to public law and to the control of administrative tribunals. Thus the measures of decentralisation have increased rather than decreased the judicial function of the Conseil d'Etat.

3. Finally, the Conseil no longer, as before 1872, merely gives opinions to the head of the state—king, emperor, president—thus making it possible for him and the government to ignore the advice. In that way, it was possible for the administration, through its heads, still to be judge in its own cause. The statute of 24th May, 1872, has abolished this state of affairs and substituted for the régime of "Justice retenue" that of "Justice déléguée"; the Conseil is now invested with a proper power, and decides itself in a sovereign manner. Its decisions are enforceable against government, all public authorities and all citizens

alike. The Conseil has exercised its power with skill and pendence. It has known how to reconcile the rights of the st of the various public authorities, and of the police, with t recognised liberties of the governed. The latter have appeale to it with the confidence that they would be judged with impartiality—no matter how important the challenged administrative act may be—and that confidence has helped to develop the judicial function of the Conseil.

The judicial function of the Conseil is exercised by the Litigation Section, which is composed of a President and special members. It is divided into eight subsections, of which four prepare the matters to be judged by the Section and four others judge the matters of minor importance: taxes, local elections, pensions. For the adjudication of very important matters, the law has provided an organ placed above the litigation section: the Plenary Assembly of the Conseil d'Etat, in its judicial capacity, composed of the Vice-President of the Conseil, the members of the Section, and three councillors chosen from the administrative sections. There are thus three judicial organs within the Conseil: the Plenary Assembly for the very important matters, the Section for normal matters, four sub-sections for the smaller matters.

To these various judicial organs is attached a public ministry. It is composed of ten government commissioners or assistant commissioners, chosen from the Masters of Request and the Auditors of the First Class, whose task it is to present conclusions in all these matters. These government commissioners take no orders from anyone. They speak according to their conscience, and in the name of the law.

After having described the instrument, we can now pass to the functions exercised by the Conseil. It exercises its judicial function in three different ways: as court of first instance on matters of common administrative law; as court of appeal and as court of revision (cassation).

1. The first function is the most important. The Conseil d'Etat is a court of common law in administrative matters: that means that when a dispute comes under administrative jurisdiction, and the law has not specially declared another administrative tribunal competent to decide it, the matter must, by common law, be brought directly before the Conseil d'Etat, which judges in first and last instance. The principal administrative matters are judged by this means, and the most important of them are the following: claims based on *excès de pouvoir*, that is pleas for the annulation, on the ground of illegality, of administrative acts; actions claiming state responsibility; disputes

g from most of the contracts concluded by the state; ns demanding interpretation of governmental acts, and, in ticular, of decrees made by the head of the state under inisterial responsibility.

In all these matters, the Conseil d'Etat has the direct and exclusive power of decision. But its powers are not identical in all of the matters just mentioned—

1. When appealed to against *excès de pouvoir* (*ultra vires*), the Conseil does not enter into the substance of the matter and does not give any opinion on the way in which administrative discretion has been exercised; it solely judges the legality of that act; it can neither modify it nor substitute another one, nor give instructions to the administration; its only alternative is to reject the appeal if the act is legally correct, or to annul it if it is illegal. (*Contentieux d'annulation.*)

When appealed to for an interpretation of an administrative act the power of the Conseil consists solely in making a declaration which interprets the meaning of the act. (*Contentieux d'interprétation.*)

Finally, in matters of contract and state responsibility, the Conseil fully examines the facts and the law. It proceeds as in an ordinary action, and is entitled to impose damages upon the Administration (*contentieux de pleine jurisdiction*).

2. The Conseil d'Etat acts as Court of Appeal, when, for practical reasons, and to alleviate the task of the Conseil d'Etat, the law gives jurisdiction of first instance to certain subordinate administrative tribunals. These are, above all, the interdepartmental Conseils de Préfecture, and the Conseils du Contentieux Administratif in the Colonies. The Conseils de Préfecture are mainly competent in matters of indirect taxation, public works, and actions brought against departments and municipal bodies. The Conseils du Contentieux Administratif in the Colonies are competent for disputes concerning local administration. These two jurisdictions, which are, in the administrative system, of an exceptional character, never represent the final instance, and are always subject to appeal to the Conseil d'Etat.

3. As a Court of revision, the Conseil does not sit in many cases. It is mainly in regard to the Cour des Comptes, the Army Revision Councils, and the regional Pension Tribunals that it acts as Court of Revision. In that capacity the Conseil solely pronounces on the question of law submitted to it and never enters into an examination of facts. When it deems the decision to be contrary to the law it annuls it without substituting itself another decision, and sends the matter back to the Court of first

instance. This part of its jurisdiction, therefore, belongs t
Contentieux d'annulation.

In conclusion, I should refer to certain legal matters, in wh
the work of the Conseil d'Etat has proved to be of a particula
creative and pretorian character. Of those I am going to discuss
three: *excès de pouvoir*, public responsibility, administrative
contracts.

The "*recours pour excès de pouvoir*" is an action by which a subject demands the annulation of an illegal administrative act. By means of this action, any citizen can compel the administrative authorities—however highly they may be placed in the administrative hierarchy—to respect the law. No executory administrative act, whether that of a part in the administrative state machinery, or of some secondary public body, i.e. of a department, a municipality, or a colony, is exempt from this remedy. Only judicial and parliamentary acts are, of course, exempt, for they are not administrative acts. By constant legal tradition, certain acts of State, viz. diplomatic acts and the relations between Government and Parliament are exempt. Subject to these reservations, no administrative authority is immune from the control and the censure of the Conseil d'Etat, from the humblest official to the Ministers, even to the President of the Republic, who, in the exercise of his administrative and rule making powers, has his measures cancelled by the Conseil d'Etat, if they are not in conformity with the law. But the remedy is open only to him who can show an interest in the cancellation of a particular act, that is to say, if it has in some way prejudiced the claimant. A large number of decisions of the Conseil exists on the nature of the interest required to bring the action for *excès de pouvoir*, and it has resulted in opening it, to a large extent, to the citizen. All the more so as formalities and costs are negligible. A sheet of stamped paper is sufficient to file the appeal. The appellant can send it direct, without the intervention of a lawyer. The appeal must be filed within two months of the act complained of. There are practically no costs.

Now some words about the reasons for which the Conseil d'Etat will cancel an administrative act on the ground of *excès de pouvoir*. They are: incompetence, defect of form, abuse of power, violation of the law or of acquired rights. Nothing need be said about the first two grounds, but the last two are of great interest. By violation of the law one must understand not only the violation of texts (statutes, regulations, decrees), but also the erroneous application or interpretation of these texts. In a general way, this includes the violation of all legal principles

have created legal rights, and mistakes of law or fact in motives of the administrative act in question. It is even ssible to go further and speak of a violation of law when the w has been applied under circumstances of fact which did not justify such an application. It follows from this that the Conseil d'Etat, although in matters of *excès de pouvoir* it judges purely on the legality of the measure, nevertheless has the right to examine the facts in so far as the examination and appreciation of facts appear to it indispensable for the discovery of an illegality. In this way, the Conseil has extensive powers of investigation.

But it is chiefly in matters of abuse of power (*détournement de pouvoir*) that the function of the Conseil d'Etat is interesting. By *détournement de pouvoir* one understands the exercise, by an administrative authority, of its powers for a purpose other than that for which the law has conferred the power. Such an act has all the appearances of legality. The authority acted within its competence; the legal forms have been observed; the letter of the law has been obeyed. And, nevertheless, this act is not legal because its author has used his powers and all the appearances of legal regularity in order to do something which he had no right to do. He has not carried out the purpose of the law, has not acted in the general interest; he has abused his powers in order to pursue an objective contrary to the objects of administration; he has committed an error often due to bad faith and malice. Thanks to *détournement de pouvoir*, the Conseil d'Etat keeps a watch over administrative morality.

The appeal for *excès de pouvoir* is the most important monument of public law and administrative jurisdiction. It is also the most useful one. It gives to the Conseil d'Etat the weapon by which it can ensure, within the administration and the activities of the state, the sovereign reign of the law. It makes of the Conseil d'Etat the unchallenged head of all administrative authorities. In other countries, notably the United States, certain institutions, like the Supreme Court, protect the citizen from an abuse of the law. It is done by means of controlling the constitutionality of laws. In France the law is supreme, and no authority can suppress or twist it. There is no remedy against the law itself, however objectionable or even unjust it may be. But, on the other hand, the state and all public authorities are subject to the law no less than the citizen. When a country has an administration which is powerful, autonomous, and has the power of coercion, it is vital that its activities should be circumscribed within the limits of the law. Without it order and liberty could

not be maintained. This task of legal discipline is u
Conseil d'Etat, which has carried it out with wisdom
and competence, by means of the remedy for *excès de*

It remains to say a few words about two other
creations of the Conseil d'Etat: responsibility of public au
and administrative contracts.

1. Public power in France is, in all its grades and ramifications, liable to pay damages for its actions. The theory of responsibility is based upon a fundamental distinction: when the damage is caused by the personal fault of an official, that is to say a fault which reveals human weaknesses and passions on the part of that official, he alone is responsible, and an action will lie against him before the ordinary law courts. If, on the other hand, the damage is attributable to a defect, a fault in the functioning of the public service, the administration is responsible, and the injured person has to sue before the administrative jurisdiction, the particular public body which has functioned deficiently, state, department or municipality. This responsibility is not governed by the Code Civil, or by any other Statute. It has been entirely created by the judgments of the Conseil d'Etat. It is based on equity, and has its source in either an administrative fault or a special risk. It gives to the victim a right to full compensation (integral reparation). I do not know of any legal system which admits an equally far-reaching liability of the state and other administrative units. The French doctrine is hard, but infinitely equitable and just, and it protects a citizen against a prejudice from which the public authority might profit, while, on the other side, it compels all administrative authorities to act regularly and normally.

2. As for administrative contracts, suffice it to say that here, too, the Conseil d'Etat has created an autonomous juridical régime which is largely different from private law, and which tends to reconcile the traditional principles of contracts with the necessities of public service, for which it is the object of administrative contracts to provide. The Conseil d'Etat has developed its theory of administrative contract in particular under the impulse of the war of 1914 and of post-war developments. The principal part of this theory is in regard to concessions for public services. Its decisions in this matter have evolved the famous theory of "lack of prevision" (*imprévision*) which has no analogy in private law, and which, while maintaining the essential aspects of existing contracts, has obliged the authorities which give the concessions to come to the assistance of the concessionaries; it has thus made it possible to adapt contracts to circumstances,

conciling the exigencies of equity with the well understood rests of the public services.

In conclusion, some general observations might be made. It through its judicial function that the Conseil d'Etat has arrived at imposing certain lines of conduct to government and administration, and at ensuring internal administrative discipline. I would explain this amazing phenomenon by the great liberty left to the Conseil d'Etat in regard to the written law. Administrative law is, in France, the only branch of the law which is not codified, and which therefore lacks rigidity. The principal categories of administrative litigation are not regulated by any text. Often even the principle is not based on legislation. This has left the way open to a creative and truly pretorian activity of the Conseil d'Etat. This work, which is of exceptional value, is due, to a large extent, to the absence of codification. And this leads to another observation: The Conseil d'Etat practises, in fact, the oldest traditions of administrative jurisdiction, those which were esteemed before the legalists of the fifteenth and sixteenth centuries, and were, by the way, common to England and France. And it is interesting to note that it is the administrative jurisdiction set up, in France, against the judicial authority, which applies the traditional principles of the administration of justice much more freely than judicial authority; those principles which we have inherited from Rome and which envelop our civilisation. It is all to the honour of our Conseil d'Etat. It shows the extent of its success. It also proves that, above all institutions and written laws, we know how to maintain the imperishable traditions of the Occident.

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LIBERAL TRENDS IN PRESENT-DA
COMMERCIAL LAW

SOME ten years ago the present writer had occasion survey some of the more notable disagreements which hav arisen between the Courts, in declaring what the law is and the business community in its contention as to what the law ought to be.[1] He found that the principal source of difficulty had been the doctrine of precedent. This had led to the development of a system of rigid rules which with the growth of new methods of commerce had proved a hindrance to progress. An additional factor had been the tendency, inherent in all legal systems, towards a purely legalistic or logical conception of development in which the system tends to an ideal form, inherent in its premises and lacking regard for the actual conditions which prevail in the world of action. It is not, of course, possible for any legal system to develop for long in such a way, and for it to do so at all the legal profession must have become a powerful and independent force in society. Law is in the end the expression of fundamental social and economic forces which must have their say, but adherence to precedent and legalistic conceptions may distort its growth and make it the less able satisfactorily to perform its function of oiling the machinery of society. Whatever the type of society, be it feudal, capitalist, or socialist, the law should, and in the end will, adapt itself to playing its part in the functioning of the prevailing system. The more consciously lawyers work towards this end, instead of devoting all their energies to the mere artistic building of a legal edifice of which the foundations are legal maxims, e.g. of the common law, and the tricky rules and subrules logically deduced therefrom, the fewer maladjustments will occur in society, the less friction an well being. It is not, of course, suggested that law have no other objectives, but this is not the place for of what these should be.

In English mercantile law ever since the time of field, who was the most eminent of all exponents method, there have not been wanting many distingui in both these schools. During the period following of 1914–18 there have been a number of developments of considerable importance, some of which it may be profitable to survey in outline. It appears to the writer that the judges who have been responsible for these have, particularly in the last ten years, belonged predominantly to the school of Lord Mansfield. The

[1] See *The Conflict of Law and Commerce*, 48 L.Q.R., p. 51.

vement on the whole has therefore been liberal in outlook, hat is to say, it has tended to pursue that line which commends itself to the business community. I shall attempt in the following pages to indicate some of the outstanding developments in several different branches of commercial law, but the space at my disposal will not enable me to cover more than part of the ground.

The discussion of these trends involves some attempt to appraise the work of contemporary judges, the majority of whom are fortunately still with us, always a delicate and invidious task. Certainly the judges of the period under review, whatever may be said of their efforts in other directions, need not fear comparison with their predecessors in the field of commercial law. Almost all of those whose contribution has been outstanding had, when at the bar, practised in the Commercial Court. This was perhaps to be expected, but nevertheless reflects the high standard of ability prevailing among the practitioners in that Court.

At the beginning of the period Lord Sumner is the predominant figure. His influence was on the whole conservative, and his outlook legalistic. His main impress upon the law had probably been made before our period opens, but his mind at once acute and powerful continued to play a dominating part in all commercial appeals to the House of Lords for a number of years thereafter. Nevertheless his conservatism was not ingrained, and he had, as he once informed the present writer with some pride, been a great radical in his youth. This from time to time became resurgent in his judgments, witness his powerful dissent from the stupid and reactionary decision in *Russel* v. *Russel*, and instances are not wanting in the domain of commercial law. Scrutton, L.J., who had perhaps more of the genius of the common law, had a less disciplined mind, and his judicial career can only be described as wayward.[2] Nurtured like Lord Sumner in the strictest school of Cobden, his quick intelligence observed not without spasms of sympathy a new world drawing away from the old philosophy. He lacked, however, the patience and mental discipline, ever thoroughly to adjust his outlook, and there is accordingly in his judicial lifework a lack of that homogeneity which, for example, so magnificently characterises Justice O. W. Holmes. Lord Atkin, for so many years the colleague of Scrutton, L.J., in the Court of Appeal, possesses just that extra power of adjustment to the requirements of his age, and with his appoint-

[2] Pace Professor Karl Llewellyn whose eulogy of Scrutton, L.J., in xxxvi *Colombia Law Review*, p. 669, sub. tit. Warranties of Quality and Society the present writer cannot altogether accept, great as is his admiration for the best work of the learned Lord Justice.

ment as a commercial judge the new era of liberal decisions m be considered to begin. Since he is still fortunately hard at wor moulding the law it would perhaps be injudicious to attempt a close estimate of his work in these pages. The same applies to the work of Lord Wright, who has brought profound knowledge and robust intellect to the service of the same conception of judicial work, to Lord McMillan whose liberal temperament inclines him in the same direction, and to a junior commercial colleague such as Lord Porter. In the Court of Appeal also the tradition has been maintained, if less strongly, and we shall find the names of ex-leaders of the commercial bar such as Greer, McKinnon, and Goddard, L.JJ., together with others whose experience had lain in the more general field of the common law, as du Parcq, L.J., prominent in the case law. It is a commonplace that the Chancery Division has for years tended to produce rather a technical outlook. Sir Wilfred Greene, the first Master of the Rolls for many years to be bred in that Court, has nevertheless already shown that he is in the liberal tradition.

The note of the tendency which we are to examine is struck, and played upon, perhaps a little shrilly by McCardie, J., in *Prager* v. *Blatspiel*.[3] He was concerned with that useful and very underdeveloped doctrine agency of necessity.[4] We are not concerned to go into this problem, but it may be hazarded that true agency of necessity only arises in cases where one person purports to act on behalf of another in an emergency without having any authority from him at all. It should be distinguished from the case of an agent who in an emergency acts beyond the scope of his authority. Actually the two types of case are not distinguished in the decisions, though the point is made clearly enough in that admirable book *Story on Agency*.[5]

A priori one would expect that when an agent handling his principal's business was faced with a sudden emergency which endangered his principal's property or interests, but which he was not competent to deal with on the basis of his expressed authority his authority would by implication be extended so as to enable him to face the difficulty. It should be more than lawful for him to do so, it should be his duty to take such steps as seem proper to protect his principal, provided, of course, that he is not in a position to obtain instructions. This problem must have arisen frequently in practice, and principals must have been only too glad to accept the actions of their agents. As far as the law

[3] [1924] 1 K.B. 566.
[4] This is a subject on which there is little authority and what there is is confused. It would repay enquiry.
[5] See § 142.

it seems to have been first considered in connection with pmasters, and during the earlier part of the nineteenth century considerable jurisprudence grew up on the subject, in which the ight of the shipmaster to act in emergency was laid down and regularised.[6]

The green shoots of this promising doctrine were glared upon with Medusa-like effect by Parke, B., archpriest of the legalistic school, and withered.[7] In *Hawtayne* v. *Bourne*[8] he had to deal with a case where the manager of a mine had been faced with a threat by unpaid miners to seize and sell the machinery and tools at the mine, and had borrowed money to pay their wages in order to prevent this happening: surely sensible and enterprising action on his part. Dealing with the question of agency of necessity the learned baron expressed the opinion that this could only arise in cases of shipmasters and acceptors for honour of bills of exchange, and held that the manager's action was not binding upon his principals. This view was accepted and followed by Lord Esher, M.R., in the well-known case of *Gwilliam* v. *Twist*.[9]

In *Prager* v. *Blatspiel*[10] McCardie, J., stepped out of this current, and accepted the more liberal doctrine enunciated by Story who considered that an agent is always justified in acting beyond his authority when necessity requires.[11] The problem was the practical and comparatively simple one of a buying agent in this country who had purchased goods which owing to the war of 1914–18 he was unable to forward to his principal abroad. Actually the goods in question which were furs were of a kind which could easily be stored so that the agent was under no necessity to act as he did by selling. Had the goods been perishable or of an ephemeral type the agent would have been acting in accord with common sense, and in the view of McCardie, J., with common law also if he had sold them on his principal's behalf. In the course of his judgment the learned judge gave vent to some observations of a general character which have been much quoted and not always with approval. He said[12]:

[6] *Cf. Notara* v. *Henderson* (1872), L.R. 7 Q.B. 225.

[7] Pollock, C.B., who was certainly a less eminent lawyer, called him "the greatest legal pedant that ever existed." See Hanworth Lord Chief Baron Pollock, p. 198.

[8] 7 M & W 595.

[9] [1895] 2 Q.B. 85—the case of the driver and conductor of an omnibus entrusting the driving to a third party in an emergency. The question of communication with the principal which chiefly occupied the attention of the other members of the Courts in these cases has been disregarded for the purpose of this argument.

[10] *Supra.*

[11] *ut supra.*

[12] *Ibid.*, at p. 570.

"The object of the common law is to solve difficulties and ad relations in social and commercial life. It must meet, as far a can, sets of facts abnormal as well as usual. It must grow wi the development of the nation. It must face and deal with chang ing or novel circumstances—unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law." He goes on to quote the well-known passage from the judgment of Bankes, L.J., in *Rex* v. *Electricity Commissioners*,[13] where he says "it has, however, always been the boast of our common law that it will, whenever possible, and where necessary, apply existing principles to new sets of circumstances." The statement of McCardie, J., is of greater value as a declaration of policy than as a foundation for his decision in the case which he was deciding. All that he had to consider was whether in an emergency an agent may bind his principal by going beyond the scope of his actual authority in order to protect his principal's interests. But while in the nineteenth-century cases the Courts had set their faces against a liberal view of the agent's authority, McCardie, J., was prepared on the basis of the juristic principle formulated in the passage just quoted to adopt it. It may be said that this was entirely in accordance with the view of Story, a contemporary of and as great a common lawyer as Parke, B.[14]

In *Jebara* v. *Ottoman Bank*[15] the plaintiffs had in 1914 sent goods to Turkey and forwarded the documents to the defendants to present and obtain payment. Norwithstanding the outbreak of war, on which the defendants became enemies of the plaintiffs, they handed the documents to the buyers. Although the defendants had not claimed to act as agents of necessity it was afterwards contended that their action was justifiable on that ground. In the view of the Court of Appeal however as soon as the defendants became enemies not only did their existing authority disappear but they became quite incompetent to do any act on behalf of the plaintiffs. What they had done was therefore a conversion.[16] On its peculiar facts this decision does not really throw any light upon the problem of agency of necessity. It is necessary, however, to refer to the judgment of Scrutton, L.J., the only member of the Court who discussed the problem. The temperament of the learned lord justice was somewhat antipathetic to that of McCardie, J., and he comments rather

[13] [1924] 1 K.B. 171, at 192.
[14] See story on Agency, § 142.
[15] [1927] 2 K.B. 254.
[16] It may be noted that the House of Lords took a somewhat different view of the facts, [1928] A.C. 269.

upon his effort in *Prager* v. *Blatspiel*[17] to expand the e of agency of necessity "without clearly defining the s, if any, of its expansion." He appears to be unaware that Cardie, J., was dealing with a case of subsisting agency (an rror shared by the reporter of *Prager* v. *Blatspiel*[18] in his head-note when he treats the agent as if he had been a seller) for he says "the expansion desired by McCardie, J., becomes less difficult when the agency of necessity develops from an original and subsisting agency"[19] which was exactly the expansion suggested in Prager's case. He then refers with apparent approval to the limiting judgments of Eyre, C.J., in *Nicholson* v. *Chapman*[20] of Parke, B., in *Hawtayne* v. *Bourne*[21], and of Lord Esher, M.R., in *Gwilliam* v. *Twist*.[22] In other words he throws his weight on the side of following precedent, even when the precedent consists only in dicta.

Contrast the attitude of the Privy Council as reflected in the advice of Lord Wright in the recent case of *Firm of Yokal Chand-Jagan Nath* v. *Firm of Nand Ram Das-Atma Ram*.[23] Here the respondents were commission agents employed by the appellants in connection with the sale of their merchandise. Certain of the buyers whom they had introduced got into financial difficulties, and the respondents, concluding that, if anything was to be preserved from the wreck for the benefit of their principals, they must act quickly, accepted part payment on account, giving credit for the balance. Such action, is clearly beyond the competence of an agent of this type, and the principals sued them for breach of duty, a somewhat ungrateful action. The Privy Council considered however that in such circumstances, which in effect means in case of emergency, it is the duty of the agent to act in the best interests of his principal. The appellants could only have succeeded if they could have shown that the respondents had failed to get in cash which by reasonable exertions they could have obtained. It is interesting to notice that the action of the agents was not justified on the basis of agency of necessity, although it had resulted from the necessity of the circumstances in a commercial sense.[24] None of the earlier cases were in fact

[17] *Supra.*
[18] *Supra.*
[19] *Jebara* v. *Ottoman Bank* at *supra*, at p. 271.
[20] 2 H. Bl. 254.
[21] *Supra.*
[22] *Supra.*
[23] 55 T.L.R. 15 (which opens up the possibility of an article on the poetry of case names).
[24] As to which see *per* Sir Montague Smith in *Australian Steam Navigation Co.* v. *Morse* (1872), L.R. 4 C.P. 222, at 230.

referred to, but the result appears to approximate very to the view of the law laid down by Story.[25]

Turning to the law of marine insurance we find developm of great importance in process of emerging, which in one case any rate will probably affect other branches of insurance law I refer to the modification of the principle of insurable interest recently achieved. This principle, obviously of fundamental importance, has given rise to many practical difficulties, and these have led to a considerable disregard in business of the legal rules. It is well known that originally no such principle existed. It was introduced in marine insurance as a result of the scandals to which its absence naturally gave rise, by a statute of George II[26] and had afterwards to be extended to other types of insurance by the well known Gambling Act.[27]

Unfortunately the principle, salutary enough in itself, was developed by the Courts on legalistic lines. This did not appear at once for in the best known judicial pronouncement on the subject, that of Lawrence, J., in *Lucena* v. *Crawford*,[28] a certain fluidity is still obvious. The learned judge says that "a moral certainty of advantage or benefit" establishes an insurable interest, and again that it is sufficient "to derive benefit" from the existence of a thing or "prejudice from its destruction," a view which is incompatible with the later case law which was codified in the Marine Insurance Act, 1906. This requires that the interest must be of a legal or equitable nature.[29] Now it is obvious that many genuine business interests cannot be reduced to terms of law or equity, and this is especially so with regard to profits, which have always been a source of difficulty. An importer of merchandise has a "moral certainty" of making a profit on his transactions, and if his goods are lost while still at sea he loses not only the value of the goods, which of course he can insure, but his hypothetical profit, which is not a legal or equitable interest. But an insurance on such profits whether based on an intelligent forecast, or on the average of previous years, could not be described in any real sense as a wager, which is after all what the principle of insurable interest was invented to prevent.

The practice had, in fact, grown up during the eighteenth century of effecting insurances upon expected profits and this had been accepted by the Courts.[30] Afterwards the stricter rule

[25] *Ubi supra.*
[26] 19 Geo. II, c.37.
[27] Life Assurance Act, 1774, 14 Geo. III, c.48.
[28] (1806), 2 B. & P. N. R. 269, at 302.
[29] 6 Ed. VII, c. 41 s. 5 (2).
[30] See *Grant* v. *Parkinson* (1,731) 3 Dougl. 16 and *Barclay* v. *Cousins* (1802), 2 East 544.

opted that the insured must be able to prove that he would made a profit,[31] a doctrine not followed in the U.S.A.[32] ere the liberal tradition of Lord Mansfield has, generally peaking, continued to dominate the administration of commercial law. Another qualification upon this type of insurance is that the insured must actually own, or have contracted to buy, the goods which were lost. Although even in its modified form the doctrine of insurances of anticipated profits is not easily reconciled with the words of the Marine Insurance Act, 1906, it is generally considered that such insurances are valid.[33] Nevertheless the law has not gone far enough to satisfy the exigencies of commerce, and moreover there are other interests of a business character which do not come within a strict construction of the act, and in regard to which the efficacy of insurances must be regarded as more than doubtful.

These difficulties have had to be surmounted, because it is essential to commercial stability that such risks should be insurable. The method adopted has been the well-known "honour policy" by which the insurer admits the interest of the insured, and binds himself in honour to pay losses falling within the insurance. Such policies are of course void in law.[34] But questions of construction and other problems frequently arise in connection with them, which ought to be, and on occasion actually have been, decided by the Courts. We have thus witnessed the somewhat undignified spectacle of the judge behaving like Nelson at the battle of Copenhagen, and pretending that he is unaware that the policy on which he is passing judgment is in reality void.[35]

A region where this doctrine has given rise to much difficulty has been that of freight, which has had a long and complicated case history. Immediately after the passing of the statute[36] above referred to a very strict rule was established by Lee, C.J., a judge whose influence on the law merchant was seldom beneficial, in *Tonge* v. *Watts*[37] where he held that there was no insurable interest in freight until the cargo was actually on board ship. It is not our purpose here to describe how step by step and over a period of something like a century this doctrine was gradually

[31] *Eyre* v. *Glover* (1812), 16 East 218.
[32] See Arnould on *Marine Insurance*, 12th ed., § 287.
[33] *Cf.* Arnould *la. cit.*
[34] Marine Insurance Act, 1906, s. 4 (2).
[35] In *Buchanan* v. *Faber* (1899), 4 Com. Cas. 227, n. Bigham, J., after consulting Mathew, J., took the preferable course of announcing that he proposed, with the consent of the parties, to hear a case on an honour policy and to disregard the p.p.i. clause. This was before the Marine Insurance Act, 1906, but it is well known that honour policies have been before the Courts since that time.
[36] 19 Geo. II, c. 37.
[37] (1746), 2 Str. 1251.

liberalised. The upshot was to establish the rule that, prov
contract of affreightment has once been concluded under w
freight will be earned and some step has been taken towa
carrying it out, an insurable interest in freight arises.[38] Ship
owners have never been satisfied with the position so laboriously
reached, for even if an insurable interest arose as soon as the
contract of affreightment was concluded (certainly an arguable
proposition) it would not cover a number of possible cases of loss.
When a ship becomes a total loss it may not be possible to replace
her for some time, so that profits are lost. Again the time charterer
of a vessel who uses her in the carrying trade may lose profits if
she becomes a total loss during the currency of the charter-party.
As long ago as 1905 Walton, J., threw out the hint that a ship-
owner may have an insurable interest in the use of his ship quite
apart from questions of freight.[39] Notwithstanding the support
given to it by successive editors of Arnould[40] this somewhat
revolutionary suggestion does not appear to have been taken up at
Lloyd's. It became usual to effect insurances on freight "as if
chartered," but Lord Sumner (when Hamilton, J.) expressed the
view that this did not cover expected freight not yet contracted
for.[41] Recently, however, a type of cover on "anticipated freig
has come into use, evidently based on the policies on
profits already discussed. This is intended to cover the
ship being sent to a port where she hopes to pick up a
party, or where her owner intends to put her up as a ge
It is obvious that here again we have a genuine con
interest in the freight which it is expected will be earned, b
equally obvious that there is no legal or equitable interes
technical sense of those terms. Nevertheless, in *Robertson v.
Petros M. Nomikos*[42] where the policy was on freight "chartered or
unchartered"[43] Lord Wright said "the intention may be to secure
that even if the vessel at the time of the casualty has no cargo on
board (that is, is in ballast) and has no charter, there shall be
no question of insurable interest. . . . The intention may be to
provide that the owner's interest in the profit earning capacity
of his ship, which is certainly a good interest in a business sense,
should be deemed a sufficient interest for purposes of this policy.

[38] See the authorities discussed in Arnould, § 263, *et seq.* The position is not free from doubt, and the position taken up by the editors of Arnould is perhaps more liberal than a narrow reading of the authorities would allow.

[39] *Manchester Liners* v. *British & Foreign Marine Insurance Co.* (1901), 7 Com. Cas. 26 at p. 33.

[40] *Ibid.*, § 288.

[41] See *Scottish Ship Line, Ltd.*, v. *London & Provincial Insurance Co.*, [1912] 3 K.B. 51 at p. 63.

[42] [1939] A.C. 371 at p. 384.

[43] Clause 5 of the Institute Clauses, below, p. 283.

ıd see no legal obstacle why this agreement should not ,ve effect." Now it is certain that the parties cannot by con- ,c establish an insurable interest where the law does not ;ognise one.[44] Hence it is clear that in Lord Wright's opinion ne question of insurable interest does not depend on whether there is a contract of affreightment in existence, provided a genuine interest in a business sense exists. This is a test after the heart of the business community, and one which if laid down in the beginning might well have prevented the whole growth of the honour policy system, and all the trouble to which it has given rise.

Lord Wright's statement was, however, *obiter*. It has now been followed by Goddard, L.J., sitting as a judge of the King's Bench in *Papademitriou* v. *Henderson*[45] where the insurance was on "freight and/or chartered freight and/or anticipated freight" valued at £3500. During the currency of the policy which was for three months the vessel was seized by the Spanish insurgents, and detained by them during the remainder of the three months period. After the voyage on which she was engaged when seized the vessel had a charter-party for a voyage to Hamburg which port she would have reached in the normal course of events with time for another voyage; but she had no further contract. The voyage to Hamburg would have earned £2842, and the learned judge held that the vessel would have had no difficulty in earning the balance of £658 by obtaining employment at Hamburg. He held that there was sufficient to establish an insurable interest in "anticipated freight." He said:[46] "In my opinion I ought to give effect to the clear terms of the policy. The parties are saying 'I, the shipowner, have a profit-earning ship, a ship with which I can earn profit, and I want to insure that, if this ship is seized during the time that the policy is current and effective, I shall recover a certain sum which is "anticipated"; because I anticipate that I shall be able to earn at least that sum, if not more, during the period.' "

The Courts have also been occupied with difficult and important points relating to constructive total loss. The doctrine of constructive total loss is in some ways the most interesting problem which arises in connection with insurance law. It goes back to early times in the history of marine insurance, and affords an excellent example of how the exigencies of business produce legal rules for dealing with them. When a casualty occurs during

[44] Marine Insurance Act, 1906, s. 4 (2).
[45] (1939), 55 Com. Cas. 29.
[46] At p. 40.

a voyage there is obviously going to be a possible difficu deciding as to its extent; is it really a total loss or is it goin be possible to effect repairs? Or perhaps the vessel is under jurisdiction of a Prize Court: is she going to be condemne and therefore lost, or released? Now one very important point is as to who is to bear the loss of the delay caused by these matters, the insured or the insurer. The insured is a business man to whom his capital is his essential tool. He must not have it locked up while investigations are being made, or legal machinery is grinding out its decisions. The insurer therefore takes this extra risk. He pays for a total loss, and in exchange he takes over the subject-matter of the insurance, for loss or gain.

In early times the essential feature of this doctrine is the abandonment of the insured property to the insurer. Indeed, it is a doctrine of abandonment rather than of constructive total loss, a phrase which appears, as far as I know, comparatively late. To the legal mind it is rather an anomaly. How can a ship, which may be quite easily if expensively repaired, be a total loss? Is the cardinal principle of indemnity satisfied? It may well be that had not the practice become inveterate before the lawyers really got to work on marine insurance they would have scotched it at birth.

One aspect of the subject which has proved particularly thorny is that of constructive total loss of freight. In most cases where there is a constructive total loss of a ship the loss of the freight will be actual, and there will be no need for abandonment. Even in cases where this is not so it is perhaps difficult to see how the insurer is to gain by abandonment. Nevertheless, cases of constructive total loss of freight appear in the reports from the early nineteenth century, and though not of great frequency they are of sufficient difficulty to merit some twenty-five pages of discussion in Arnould. In spite of this the Marine Insurance Act, 1906, which purported to codify the law is completely silent on this topic, a silence said to be due to the fact that the eminent lawyers who considered the bill in draft were unable to agree as to what the law really is on the subject![47]

As has been already indicated, the main problem in connection with total loss of freight arises from the fact that it involves a preliminary casualty to the vessel or her cargo. Nevertheless these matters are from a legal point of view independent of the freight insurance, so that if a vessel is seized by a government and abandoned to underwriters as a constructive total loss, the

[47] See *per* Scott, L.J., in *Kulukundis* v. *Norwich Union Fire Insurance Society, Ltd.*, [1937] 1 K.B. 1.

t may nevertheless be earned by the latter, so that it cannot, ly speaking, be said to be lost, although the insured himself s not had it.[48] Surely a narrow and legalistic rule. But suppose at although the freight-earning vessel is so badly damaged as o prevent her earning her freight, the owner prefers to have her repaired rather than abandon her to underwriters, and claim on his policy, a course which he may well adopt if values are rising rapidly. The freight here, too, is lost, and therefore, commercially speaking, should be recoverable from the underwriters. At first sight it is difficult to see how there can be a constructive total loss of freight without the preliminary loss of the vessel, and for a Court inclined to take a legalist attitude this would certainly afford a ground for deciding against the liability of the insurer.

This matter came up for discussion in *Robertson* v. *Petros M. Nomikos*[49]. Here, as in other recent cases on this subject, the insurance was effected on the terms of the Institute clauses, those relevant for our purpose being as follows—

(5) In the event of the total loss, whether absolute or constructive, of the steamer, the amount underwritten by this policy shall be paid in full whether the steamer be only partly loaded or in ballast, chartered or unchartered.

(6) In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value.

(8) Warranted from any claim consequent on loss of time whether arising from a peril of the sea or otherwise.

The freight-carrying vessel was chartered by the respondents to proceed to Venezuela for a cargo and insured with the appellant underwriter. Before proceeding to her loading port she was docked at Rotterdam for repairs where she was so seriously damaged that the chartered voyage had to be abandoned. Her owners, however, found that owing to the increased value of shipping it would pay them not to claim for a constructive total loss but to have her repaired and claim for a partial loss. They claimed, however, on their freight policy for a constructive total loss under clause 5 of the Institute clauses. The insurer contended that there had never been a constructive total loss of the vessel, and that in any case the loss was due to the delay, and therefore defeated by clause 8 (as to which see the *Carras Case* below). In the Court of first instances Goddard, J.,[50] accepted the view

[48] *M'Carthy* v. *Abel* (1804), 5 East 388; *Scottish Marine Ins. Co.* v. *Turner* (1853), 1 Macq. H. L. C. 334.
[49] [1939] A.C. 371.
[50] (1937), 43 Com. Cas. 103.

that there had never been a constructive total loss of the since there had never been any abandonment. In the Co Appeal[51] this decision was reversed on the rather artificial gro that the parties had provided their own meaning for a constructi total loss by means of the above clauses, and that a loss withi this meaning had taken place. In the House of Lords, however, where the Appeal was upheld, their Lordships took the bold course of announcing that abandonment is not an essential ingredient of a constructive total loss at all.[52] It is simply a condition which has in most cases to be satisfied before a claim can be successfully made for constructive total loss. Here the respondents *qua* shipowners were not claiming for any such thing, and *qua* freight owners it was unnecessary, since no benefit could accrue to underwriters from it. It could hardly have been contended on any reading of the early authorities that abandonment is not essential to a constructive total loss, and it is significant that none of the learned judges who held to this effect discussed on this topic[53] any of the cases decided before the Marine Insurance Act, 1906. It is unlikely that the draftsman of the Act, the late Sir Mackenzie Chalmers, intended to alter the law which he was codifying, and indeed he starts off boldly with the statement that "there is a constructive total loss where the subject-matter is reasonably abandoned . . ."[54] If the matter stopped there *cadit quæstio*, but fortunately from the point of view of elasticity he had the weakness of almost invariably following up a general definition by a subsidiary clause commencing: "(2) In particular there is a (constructive total loss) when, etc." This may, and in this case did, furnish a means of escape. Further, in section 61 it is enacted that when there is a constructive total loss the assured may either treat the loss as a partial loss or abandon the subject-matter, etc.," which makes it comparatively simple to make hay of the general definition. The draftsmanship of this statute is loose in a number of particulars which is perhaps to be explained by the fact that Chalmers was not very familiar with the subject.[55]

The modern doctrine of constructive total loss no doubt grew out of the right of abandonment, but if it is to be a flexible

[51] [1938] 2 K.B. 603.

[52] See *per* Lord Atkin at p. 377 (he actually speaks of notice of abando ment), Lord Wright at p. 382, and Lord Porter, p. 393.

[53] According to the well-known decision in *Bank of England* v. *agliano*, [1893] A.C. 107, this is, of course, correct, but normally speaking judges do not resist the temptation of a short historical disquisition.

[54] Marine Insurance Act, 1906, s. 60 (1).

[55] He succeeded, probably unwittingly, in altering the law on another aspect of constructive total loss, as to which see Arnould, § 1097 (*a*).

ıment fitted to dealing with such commercial problems as , arising from insurances on freight it must part company ıı its parent, a fact which the House of Lords has wisely ɔognised.

Two recent cases on the same topic decided by the Court of Appeal may be referred to shortly as indicative of the same tendency. In *Carras* v. *London & Scottish Assurance Corporation*[56] the policy was in much the same terms as in *Robertson's Case*.[57] The freight-earning vessel stranded on the way to Valparaiso, her loading port, and notice of abandonment was given to her hull underwriters who paid a total loss. The vessel was eventually salved and repaired when she was so valuable that on the application of clause 6 above[58] she could not be regarded as a total loss. Porter, J., however, held that there was a loss of the adventure, but that a claim based upon this must fail, because it was consequent on loss of time within the meaning of clause 8 above.[59] He was supported in that view by *Bensaude* v. *Thames & Mersey Marine Insurance Co.*,[60] where an adventure was frustrated by the breaking of the vessel's main shaft, and the consequent loss of freight was held to be irrecoverable owing to the same clause. In the Court of Appeal, however, Lord Wright (then M.R.) held that the loss of freight was not caused by the delay, but by the destruction of the charter-party by the perils of the seas.[61] With this bold argument the other members of the Court of Appeal agreed. It is difficult to see how a charter-party can be destroyed otherwise than by frustration. If it was frustration then where is the intrinsic difference between frustration through the breaking of a shaft, and frustration through the grounding of the vessel? It is true that in the one case there is, as Lord Porter points out in *Robertson's Case*,[62] a particular average loss to the vessel and in the other a constructive total loss of the adventure, but each operates to cause the same kind of loss. The *Carras Case* must be taken as an audacious case of a distinction made for the avoidance of a not very happy decision, and it is one which was accepted in the *Robertson Case* where the argument on loss of time was rejected also.[63]

[56] [1936] 1 K.B. 291.
[57] *Supra.*
[58] It was actually numbered 5 in this particular policy.
[59] Clause 7 in this policy.
[60] [1897] A.C. 609.
[61] At p. 299.
[62] At p. 394.
[63] The same sort of point was discussed very shortly afterwards upon somewhat different facts in *Kulukundis* v. *Norwich Union Fire Insurance Society, Ltd., supra.* It is unnecessary here to enter upon a discussion of the somewhat technical differences.

Turning to the law of carriage by sea, perhaps the fruitful topic of inquiry is the decisions on deviation. There probably no example, unless it be the doctrine of rejection cases of sale[64] of a salutary and necessary principle being pushed to such absurd lengths as this. It is difficult for the ordinary business man, to whom the doctrine is explained, to suppress his irritation, and when the beauty of the logical processes on which it depends is pointed out to him his language on the subject of logic is neither restrained nor polite. To generations of commerce students I have lectured on this topic and taken *Morrison & Co., Ltd.* v. *Shaw Savill & Albion Co., Ltd.*[65] as a convenient example. When I point out to them that the vessel deviated from the London route to Havre in order to discharge a large part of her cargo which was destined for France; that such deviation was due to the risk of meeting an enemy submarine; that after she had started for London again she was torpedoed and lost; but that this loss was not protected by the exception of King's enemies, because if the carrier once ceases to carry out his contract he becomes liable for the safety of the goods in any event, I invariably see a look of incredulity steal over the faces of the class, and no doubt their individual minds are busy formulating for themselves the celebrated proposition of Mr. Bumble anent the law. It is quite true of course that the risk is altered by such a deviation, but the real question should be whether the deviation was reasonably likely to increase the risk judged in the circumstances prevailing at the time it took place.

Nevertheless, since that case things have moved a little bit. In the first place it has been shown that it is possible to draft a watertight deviation clause.[66] In case after case deviation clauses, which have been in use for a long time, have been rejected as not sufficiently widely drafted, until it began to be doubtful whether there was any set of words which could pass the scrutiny of the Court. As Branson, J., said in upholding the clause in the case just cited it marked "a step forward in the contest between shipowners and shippers, the shipowners attempting to keep the order and disposition of their vessels unhampered." But it did more than this, for it marked the introduction of a clause of such an extreme character that the owners might have sent the vessel for weeks in a direction opposite to the voyage agreed upon

[64] See *per* Scrutton, L.J., in *Hillas & Co.* v. *Arcos* (1931), 36 Com. Cas. 353 at 368, and 48 L.Q.R., p. 70.

[65] [1916] 2 K.B. 783.

[66] See *Connolly, Shaw, Ltd.* v. *Nordenfjeldske Steamship Co.*, 50 T.L.R. 418: it is unnecessary to give its actual terms; *Frenkel* v. *McAndrews*, [1929] A.C. 545, may also be referred to, though the issue eventually turned on a subsidiary point.

t apparently losing protection, except that in the case of a
hable cargo the learned judge thought that it would have
trated the objects of the contract, and might therefore have
en disregarded. But shipowners are really not concerned with
iberties of this kind; all they want is some latitude for reasonable deviation, now apparently secured in contracts where the Hague Rules apply.[67] If the Courts had construed the earlier and less ambitious clauses rather more liberally it is unlikely that the modern and really outrageous clause would ever have been invented.[68]

Next we must notice that the House of Lords has decisively rejected the view laid down in *Morrison's Case* and other cases[69] that the deviation displaces the whole contract of carriage, depriving the carrier of the right to rely upon its exceptions clauses even for the purpose of protecting himself in respect of incidents occurring before the deviation took place. In *Hain S.S. Co.* v. *Tate & Lyle*,[70] the breach of contract involved in a deviation was equated with an ordinary breach of condition giving the innocent party the usual remedy, viz. the right to treat the contract as repudiated, or to waive the breach of condition—in the words of Lord Atkin: "There is implied an absolute condition not to deviate."[71] On this basis the doctrine, though still capable of working harshly, loses something of its unique and rather terrible character, and it is conceived that the carrier is not prevented from relying upon the terms of his contract to obtain protection against liability for loss or damage which occurred before the deviation. This at any rate appears to have been the view of Lord Maugham, who seems to associate himself with the view[72] that "the charterers became entitled to treat the contract as at an end as from the date of the repudiation," which must mean that it is still subsisting and operative up till that time.[73]

It may be observed that the rigour of the doctrine is well exemplified by the judgments given in this case by the Court of Appeal,[74] more particularly in the discussion on forfeiture of

[67] See Art. IV, r. 4.

[68] See *Morrison, etc.*, v. *Shaw, Savill, etc., supra*, where the bill of lading gave "liberty on the way to London to call and stay at any intermediate port or ports to discharge . . . cargo, etc., but it was held that Havre was not an 'intermediate' port."

[69] *Supra*, and see also *Joseph Thorley* v. *Orchis Co.*, [1907] 1 K.B. 660.

[70] (1936), 41 Com. Cas. 350.

[71] *Ibid.*, p. 354.

[72] Given hypothetically at p. 371.

[73] But see Scrutton on *Charter-parties*, 14th ed., § 99, where the present editors come to an opposite conclusion.

[74] (1934), 39 Com. Cas. 259.

freight after deviation, which this Court unanimously d must follow. In this argument we get logic pushed to the ex limit, and the carrier treated as a sort of trespasser *ab initi* relation to the goods. Greer, L.J., definitely states that af deviation "the goods are carried unlawfully,"[75] and the followin passage from the judgment of Scrutton, L.J., applies the legalistic method unblushingly: "The fact that a volunteer without authority renders services to another man's property does not give him a right to remuneration, or to keep the property unless he gets remuneration. There is no authority on the question, but *as a matter of logic* I think the claim for freight fails."[76] The result may follow from the premises, but the premises are absurd; the shipowner can only be regarded as a volunteer by an extravagant legal fiction.

The Court of Appeal would accordingly in their wholehearted pursuit of logic have permitted the goods owner to enrich himself in the most unjustifiable way at the carrier's expense. It is interesting to compare this attitude to that adopted by the Courts towards attempts by one party to a contract to exact a penalty from the other, often with a better moral claim than in this business of deviation. It is interesting also to observe that Scrutton, L.J., forsook the opinion expressed in his own book in the generosity of his youth when[77] he considered that a fresh agreement to pay freight could be inferred from acceptance of the goods under the bill of lading, or, alternatively, a claim could be made on a quantum meruit.

As the case went in the House of Lords it was not necessary to decide this point. The opinion was, however, unanimously expressed that no claim to freight can be made under a contract which has been repudiated. But two members of the House appear to have felt the view revolting that no remuneration could be claimed at all. Lord Maugham emphatically states that the carrier who continues to carry after deviation "is not a wrong-doer."[78] Lord Wright makes it perfectly clear in a powerful dictum, with which Lord Maugham was clearly in complete sympathy, that freight can be recovered on a quantum meruit. He says that "a sweeping general rule such as the Court of Appeal laid down will if it be correct have startling consequences." He then puts the hypothetical case of a voyage from Australia to England with a possible deviation of a few hours, and continues: "It may be that by the maritime law the

[75] *Ibid.*, 284.
[76] See p. 271—the italics are mine.
[77] See Scrutton on *Charter-parties*, 13th ed., § 99.
[78] See. p. 371, and see also *per* Lord Wright at p. 368.

tionship of carrier and goods owner still continues despite deviation."[79]

A year later we find the Privy Council establishing a new and perhaps important qualification on the doctrine, and showing a tendency towards a new *ratio decidendi*. The deviating vessel had returned to the proper course, but owing to the incompetence of a steersman was run on to a rock and lost.[80] The point at issue was whether the owners had forfeited the privilege of limiting their liability under section 503 of the Merchant Shipping Act, 1893, and it was held that even assuming that they had been privy to the deviation this had nothing to do with the cause of the loss. Now hitherto the doctrine of deviation has not normally been connected with causation in the direct sense. For instance in the *Morrison Case*[81] the loss was not proximately caused by the deviation, but by the explosion of the torpedo. The argument has always been that but for the deviation the vessel would not have been at the place where she was when the loss took place, and it was accordingly laid down in *Morrison's Case* that the carrier can only escape if he can show that the loss must still have occurred had he not deviated at all. In the *Paterson Steamship Case* no evidence to this effect was led at all, though it is clear that the Court attached importance to the fact that the vessel was back on her course.[82] It is difficult to see any logical reason why if a statutory protection is not displaced by deviation the common law exceptions which are much more fundamental should be displaced, and, indeed, the exceptions under the Carriage of Goods Act, 1924, were held to have been displaced by deviation in the *Ixia*.[83] The *Paterson Steamship Case* is a somewhat muddled one, and must perhaps be taken with reserve: at the least it seems to establish, however, that protection revives in some cases when deviation ceases.

One of the most constant sources of trouble in connection with deviation has been the delimitation of the contractual voyage. This is bound to be described as from port A to port B. The literalist is apt to take a geographical route between these two points, and hold that any departure from it is a deviation. It has, however, long been recognised that the carrier is entitled to take, and indeed should take, the route which is commercially usual. It is well known that usage cannot defeat the plain words of a contract and this has given the literalist school the opportunity of

[79] See p. 368.
[80] *Paterson Steamships, Ltd.* v. *Robin Hood Mills, Ltd.* (1937), 58 Ll.L.Rep. 33.
[81] *Supra.*
[82] See p. 39.
[83] [1932] A.C. 328.

preventing the leading of evidence as to what was customa the grounds that it was irrelevant.[84] In other cases, however, Courts have gone behind the literal construction of the contrac and looked at the situation in the light of the knowledge of the parties, and the prevailing practice.[85]

It is to be hoped that this matter has been finally set at rest by the House of Lords in the *Reardon Smith Line Case.*[86] In this case the charter-party provided that the ship was to sail from Poti in the Black Sea to Istanbul and thence to an American port. Instead of proceeding directly to Istanbul the vessel went to Constanza for oil bunkers. Evidence was tendered to prove that this was a common practice, and that therefore the route taken was commercially proper. While Goddard, J., accepted this evidence[87] it was rejected by a majority of the Court of Appeal[88] on the ground that the words from Poti to Istanbul were clear and unambiguous, and not to be contradicted by any evidence as to what was commercially usual. And here we have another frequent cause of complaint about the administration of the law. The Commercial Court was founded in order that judges experienced in the law merchant might adjudicate upon mercantile causes. Goddard, J., tried this case as commercial judge, and Greer, L.J., spent many years in the same Court. Nevertheless their views had to give way to those of Slesser, L.J., whose experience had lain in Trade Union Law and Workmen's Compensation, and Clauson, L.J., a master of equity and Chancery practice. But for the intervention of the House of Lords their decision would have nevertheless become a leading authority in commercial law.

In the House of Lords, however, it was held that a proper examination of the authorities showed that they "recognise the necessity of ascertaining what is the understanding of business men on the matter, presumably by appropriate evidence";[89] that the evidence showed that 25 per cent of ships were now calling at Constanza; and that in the circumstances the route was a usual and commercially proper one and did not involve a deviation.

Before leaving the subject of carriage a word must be said about the attempt made by Scrutton, L.J., to torpedo the

[84] *Cf. Glynn* v. *Margetson,* [1893] A.C. 351, and particularly the majority of the C.A. in *Reardon Smith Line* v. *Black Sea & Baltic General Insurance,* [1938] 2 K.B. 730.
[85] *Cf. Frenkel* v. *MacAndrews, supra.*
[86] [1939] A.C. 562.
[87] 42 Com. Cas. 332.
[88] Slesser and Clauson, L.JJ., Greer, L.J., dissenting: see, [1938] 2 K.B. 730.
[89] See *per* Lord Wright at p

e Rules. Notwithstanding the fact that the largely standard-
d contract of affreightment which is brought into operation by
ese rules, as given legislative effect by the Carriage of Goods by
ea Act, 1924,[90] represent years of negotiation and compromise
by the shipowning, commercial, and banking interests involved,
this learned judge from the outset expressed his dislike for the
whole attempt in no uncertain terms.[91]

As is well known the compromise recognised by the Act puts the obligation upon the carrier to exercise due care in all that pertains to the storing and handling of the cargo. In return for this he is exempted from responsibility for loss or damage caused by the usual maritime perils from the incidence of which sea carriers have long protected themselves, and in particular from "act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in management of the ship."[92] In *Gosse Millard* v. *Canadian Government Merchant Marine*[93] during some repairs to the hatches of a ship the covers were negligently not replaced so that during a storm of rain the cargo was damaged. In the view of Wright, J., who tried the case, this was negligence not in the management of the ship but in the custody of the cargo, and he held the carrier liable. The spear head of the attack which reversed this judgment (Greer, L.J., dissenting) was certainly Scrutton, L.J. and his argument well repays attention. First of all he rejects a plea for harmony between this country and other countries in the interpretation of what is, after all, an international convention by quoting and relying upon the very insular remarks of Lord Esher, M.R., in *Svendsen* v. *Wallace*[94] where he scoffs at the idea of making the law of "the greatest commercial and maritime country in the world bend to the law of other countries whose commercial operations are far less extensive, and where commercial adventure is far more timid." He then[95] accuses the Courts of the United States with having "approached shipping matters from the point of view of the cargo owners," because that country has not been a shipowning country and indicates that in his view most of the U.S. decisions on the subject of management are wrong. Was he oblivious of the fact that in his own judgment he was striking a blow in the interests of the shipowners? His view,

[90] 14 & 15 Geo. V, c. 22.
[91] See his evidence before the Joint Committee on the Hague Rules, and also the preface to the eleventh edition of Scrutton on *Charter-parties*, where the interpretation of the Act is referred to as a "terrifying prospect."
[92] Art. IV, 22 (*a*).
[93] [1929] A.C. 223 H.L.
[94] (1884), 13 Q.B.D. 69 at 72.
[95] p. 732.

if accepted, would of course have driven the proverbial ca and pair through the statute, and either dragged foreign co at the carriage tail of "the greatest commercial and maritim country," or led to a divergence which would have deprived th international compromise effected at The Hague of most of its meaning.

In the House of Lords much more respect was paid to the objects of this legislation. Lord Sumner, for example, was very much alive to the object of Scrutton, L.J.'s judgment. He says "on this construction the obligation of Article III r. 2 to take care of the cargo is practically eviscerated and its business efficacy is frustrated. In every set of circumstances, of common occurrence at any rate, the shipowner would be relieved. Considering the provisions of the Act of 1924 and the circumstances in which it was passed, such an interpretation is admissible only if the words used are clear to that effect."[96] In the result the House was unanimous in restoring the decision of Wright, J.

For my final topic I will choose an episode from the law of banking. The relationship of banker and customer, one of the most important in the commercial world, has received remarkably little scientific analysis, and indeed the cases which directly touch upon the subject are but few in number. Considering that banking in its modern form goes back to the time of the Parliamentary War, it is also curious that there are no cases at all until the nineteenth century.

Modern banking started when timorous people deposited their money and valuables with the goldsmiths. The transaction appears to have been regarded as one of bailment, and the relationship was pleaded on that basis until well into the nineteenth century.[97] But as soon as the question arose as to the responsibility of the banker for the money which he had received from his customer, and which, of course, he had been using to lend to others for some two hundred years, it was perceived that bailment afforded no sort of basis at all. It was then suggested that the relationship was one of agency, the banker being a sort of broker between those who have money to lend and those who wish to borrow. This was the business conception of the matter as appears from Gilbart's famous book on *The Principles and Practice of Banking*, where he describes the banker as "an intermediate party between the borrower and the lender."

In the early nineteenth century the conception of agency had hardly developed sufficiently to permit of the acceptance and

[96] 34 Com. Cas. 94 at p. 102.
[97] See th[illegible] in *Mar[illegible] Will[illegible]* [illegible]d. 415.

elopment of the possibility, though it was undoubtedly the e which contained the most fertile seeds of progress. In evaynes v. *Noble*[98] it was first held that the banker is a mere borrower from the customer. This view does not appear to have met with ready acceptance, for it was not finally established until 1848 in the famous case of *Foley* v. *Hill*,[99] where the agency basis was strongly argued for in order to try and establish that the banker was a trustee of his customer's money. Now this would of course have blown up the whole business, and the House came down heavily on the side of a debtor-creditor relationship.

But it is quite obvious that this is a thoroughly inadequate basis, and in the very case of *Foley* v. *Hill* special qualifications had to be introduced in respect of repayment against the customers' cheques. These the reporter attempted to summarise by a phrase not found in the speeches but which became famous, that of the "super-added obligation." Whenever it became necessary to lay down some new aspect of the banker's duty towards his customer it was found to exist by virtue of a "super-added obligation."

The duties of the banker are of course numerous and complicated. Apart from the obvious one of restoring the customer's money, none of them appear to follow either logically or otherwise from the debtor-creditor relationship. The banker must not, for example, disclose to any third party the state of the account, that is how much money he owes to his customer,[100] nor can he terminate the relationship by repaying the debt, he must give a reasonable notice,[101] he is responsible for collecting bills and cheques for his customer's account, and indeed has a number of other duties which it is simply not possible to infer from his position as debtor.

The absurdity of the situation was revealed in 1921 by the well-known case of *Joachimson* v. *Swiss Banking Corporation*.[102] Here in order to wind up a partnership a writ had been issued against the bank before any demand had been made for payment of the balance standing to the credit of the account. When the bank contended that they were entitled first to have a demand the obvious rejoinder was made that the debtor must seek his creditor, and pay without being asked. But this is absurd from the point of view of common sense and banking practice, yet it was accepted by the trial judge, logically applying the decision in *Foley* v. *Hill*.[103] In the Court of Appeal, however, a more

[98] (1816), 1 Merivale 625.
[99] 2 H.L.C. 14.
[100] *Tournier* v. *National Provincial Bank*, [1924] 1 K.B. 461.
[101] *Prosperity, Ltd.* v. *Lloyds Bank* (1923), 39 T.L.R. 372.
[102] [1921] 3 K.B. 112.
[103] *Sutton*

forward-looking attitude prevailed, and the majority of the Lords Justices were prepared to find another super-added obligation, that to make a demand on the banker for repayment before the money can become legally due.

To the mind of Atkin, L.J., however, this appeared a half-hearted and unsatisfactory method of dealing with a point which really involved the whole conception of the relationship between the parties. Precluded as it appeared by *Foley* v. *Hill*[104] from finding a basis in agency he cast about for some principle which would at any rate be more scientific and nearer to commercial reality than that of debtor and creditor, even though helped out with such super-added obligations as the Courts might infer. What he found to exist between the parties was a contractual relationship of a general character involving obligations on both sides of a somewhat extensive sort. The conception is unitary, and though no doubt the undertaking by the banker to borrow from the customer such sums as the latter may be ready to pay to him is an essential feature of it, it contains other obligations of very substantial importance, often only indirectly connected with the aspect of loan. The learned Lord Justice sets out a number of these in a passage of his judgment[105] which has naturally become of classical interest. This, however, does not profess to be complete, and is, for example, silent on the important duty of the banker to treat his customer's affairs as confidential, a matter which was to engage his attention three years later in *Tournier's Case*.[106] This obligation is of a fiduciary nature, and it appears first to have been discussed during the period when the agency aspect of the relationship was still in men's minds, that is in 1850, when in *Tassel* v. *Cooper*[107] a jury had found that a bank which had disclosed the accounts of a farm bailiff to his employer had acted in breach of duty. Many of the other duties existing between banker and customer are similar in character to those existing between a principal and his agent, and it appears to me that there is yet time to mould and simplify Lord Atkin's contract on these lines.

Technically, since his judgment was but one out of three in the Court of Appeal, Lord Atkin's conception of this relationship is no doubt not of binding validity, but it is in accordance with the march of events, and has been generally accepted by the text writers.

R. S. T. CHORLEY.

104. *Ubi supra*.
105. See p. 127.
106. See *supra*.
107. 9 C.

STATUTES

The Courts (Emergency Powers) Act, 1939

In time of war many persons find difficulty in performing the contractual obligations assumed by them before, and often without any regard to the possibility of, the outbreak of war; it is the problem of giving such persons some measure of protection from their creditors which this Act, and other legislation dealing specifically with men serving in the armed forces, seeks to solve. The principle adopted, which was applied during the war of 1914 to 1918[1] is to place the remedies of creditors, whether judicial or by way of self-help, in the discretion of the Court, which can refuse the creditor to exercise his remedies if the debtor is unable to satisfy the debt or obligation as a result of the war.

The matters dealt with by the Act can be classified into the remedies generally available to judgment creditors, remedies against property, and insolvency and it is proposed to examine its provisions under these headings. The restriction on the rights of a judgment creditor is that he cannot proceed to execution on or otherwise to the enforcement of his judgment without first obtaining the leave of the Court. This provision applies to all judgments or orders for the payment of money whatever the cause of action may have been, subject to the following exceptions—

(*a*) Any judgment for damages for tort.

(*b*) Any judgment or order for the recovery of a debt which has become due by virtue of a contract made after the commencement of the Act.[2]

(*c*) Any judgment under which no money is payable otherwise than in respect of costs.

(*d*) Any order in a matter of bastardy or which is enforceable as an affiliation order.[3]

(*e*) Any order made in criminal proceedings or for the recovery of a penalty under a statute.

From these exceptions it would seem that the Act is generally concerned with contractual obligations but if this be so the omission from the exceptions of judgments for breach of trust and orders for maintenance or alimony is curious. The latter orders are in any event enforceable only with the consent of the Court.[4]

The exception relating to wartime contracts is limited to the recovery of debts due thereunder, and would not seem to apply to judgments for damages on any breach of contract other than a failure to pay money. That the scope of the exception is thus limited is borne out by the distinction between debts and other obligations maintained in the Act.[5] Unless the Courts hold that the exception applies generally to all actions for damages for breach of contract the anomalous position arises in which a defaulting vendor, but not a defaulting purchaser, is entitled to the benefit of the Act.

One other remedy, the right of a vendor to forfeit the deposit, may be mentioned in this connection; this cannot now be done without leave where the contract was entered into before the Act.

[1] The Courts (Emergency Powers) Acts, 1914 to 1916.
[2] 2nd September, 1939. Section 3 (*a*) brings within the Act cases where a binding option was given before but exercised after the Act.
[3] E.g. a maintenance order made in a Court of Summary Jurisdiction.
[4] *Campbell* [illegible] [1922], p. 187.
[5] [illegible]

The remedies against property affected by the Act are those generally available to landlords and mortgagees, but only the enforcement of pre-war contracts is affected.

Landlords must obtain the leave of the Court before levying a distress or re-entering upon property. Proceedings for possession can be instituted and prosecuted without any leave except in the case of proceedings based upon failure in the payment of rent where leave must be obtained before the judgment can be enforced.

The exercise by mortgagees of their remedies against the mortgaged property is restricted as follows—

(*a*) A receiver of the mortgaged property can only be appointed by a mortgagee after leave has been obtained from the Court, but the Act does not apply to the appointment of a receiver by the Court.

(*b*) A power of sale vested in the mortgagee only becomes exercisable after leave has been obtained. If the mortgagee wishes to obtain an order from the Court for sale or foreclosure then leave must be obtained before proceedings can be instituted, or, in the case of proceedings pending when the Act came into force, before any further step can be taken.

A mortgagee of land who was in possession of the mortgaged property before the Act came into operation or who had at that time appointed a receiver who was in possession of the property or the rents and profits thereof can sell without any leave being obtained. A mortgagee of property other than land can sell without leave if he was in possession thereof and his power of sale had arisen and notice of the intended sale had been given before the Act came into operation.[6]

(*c*) A mortgagee cannot take possession of the mortgaged property without the leave of the Court, but proceedings for possession can be instituted and prosecuted without leave except that a judgment for possession under a mortgage of land in default of the payment of any money due under the mortgage can only be enforced after leave has been obtained.[7]

It is in connection with mortgages that non-compliance with the Act assumes importance for third parties. The Act does not provide any sanction for the contravention of its provisions, so that the general rule that an act done in breach of a statute is illegal and void[8] is applicable. There is no provision enabling a debtor to waive his rights under the Act, but such waivers were recognised as being valid and effective under the Act of 1914 on the ground that the Act is for the protection of individuals and not of the community generally.[9]

The results of a sale by a mortgagee without the requisite leave under the Act of 1914 were considered in *Anchor Trust Co.* v. *Bell.*[10] In this case the mortgagor commenced proceedings for redemption, the vendor mortgagee and the purchasers from him being defendants in the action. Lawrence, J., held that the purchasers had acquired only the rights of the mortgagee on the ground that they were affected by notice of the irregularities.

This decision is equally applicable to cases arising under the present

[6] There are no provisions as to how and upon whom notice is to be served.
[7] Section 1 (3) as amended by the Possession of Mortgaged Land (Emergency Provisions) Act, 1939.
[8] *Re Mahoud and Ispahani* (1921), 2 K.B. 716.
[9] *Re Sandow,* [1916] W.N. 262.

t, although section 104 (2) of the Law of Property Act, 1925, may affect he position where mortgages made after 1925 are concerned. This provides that a purchaser's title shall not be impeached on the ground that the consent of the Court, when so required has not been obtained, but the corresponding section of the Conveyancing Act, 1881, which did not provide any protection in this specific instance, did not assist a purchaser with notice.[11]

The Act does not affect the commencement of proceedings in bankruptcy or for winding up unless these are based on non-compliance with a bankruptcy notice or a demand under section 169 of the Companies Act, 1929, or are based on a judgment to which the Act applies. But whatever the claims of the creditors may be and whenever they arose the Court has a general power to stay the proceedings if the debtor's failure to meet his obligations was brought about by the war.

To turn to the Court's powers under the Act; these only arise in cases where the debtor satisfies the Court that his inability immediately to pay the debt or perform the obligation in question arose by reason of circumstances directly or indirectly attributable to any war in which His Majesty is engaged. When this is established the Court can refuse leave to exercise the right or remedy or give leave subject to restrictions or conditions.

The Act of 1914 produced little case law which is of assistance in the working of the present Act and, except in the case of *A.* v. *B*,[13] which was considered by the full Court of Appeal, the Judges have tended to confine their reported judgments to the particular facts before them on applications under the Act. The only statement of any general discretion relates to mortgages,[14] but is of no assistance in the constant stream of applications by building societies to which an effective solution can only be supplied by further legislation interfering with the contractual rights of the parties.

The meaning of the words "inability to pay" was considered in *A* v. *B*.[13] In the application before the Court the debtor company had tendered evidence of the disastrous results that the enforcement of the plaintiff's judgment would have upon the interests of its other creditors and shareholders, but not of its inability to satisfy the plaintiff's claim without regard to its other liabilities. The Court held that this was not sufficient to bring the debtor within the Act. The judgment of the Court which was delivered by Green, M.R., contains a number of statements of principle, which are not altogether easy to apply. On the one hand it was stressed that the word "inability" must be construed in a reasonable fashion so that it is not necessary for the debtor to show a complete lack of available money with which to satisfy the claim; and, on the other, that although the claims of other creditors may be considered, the debtors' inability immediately to satisfy all claims is insufficient, as the Act should not be used as a form of bankruptcy administration.

To pass to the exercise of the discretion conferred by the Act there is little that can be added to the statement of Goddard, L.J.,[15] that the Court "is really put very much in the position of a Cadi under the palm tree. There are no principles on which he is directed to act. He has to do

[11] *Bailey* v. *Barnes* (1894), 1 Ch. 25.
[12] Law of Property Act, 1925, section 104 (2).
[13] [1939] 4 All E. Rep. 169.
[14] *Re Jobson's Application*, 34 T.L.R. 184.
[15] *Levin Company* v. *Purdy* [1940] 1 All E.R., p. 191.

the best he can in the circumstances . . . having no rules of law to guide him."

Some doubt has been thrown on the general impression that the Court's powers are limited to the grant of a complete or partial moratorium by the remarks of Mackinnon, L.J., in *Blanket* v. *Palmer*.[16] The learned Lord Justice, while refraining from expressing any opinion on the point, remarked that: "So wide and so vague are the terms of the Act that my present impression is that it is quite conceivable that it might be within the powers of the Court to order almost anything in variation or in defiance of the existing contractual obligations of the parties."

If this liberal view is ultimately established the comparatively stringent conditions which must be complied with before the Act can become operative may often prove a stumbling block in many cases in which the Court could usefully intervene.

[16] [1940] 1 All E.R. 524 at p. 526.

R. L. ROBINSON.

The Prize Act, 1939[1]

It is, it could be maintained, a striking tribute to the peaceful intentions of this country that the outbreak of the present war should find its enactments relating to prize in a state of chaos. But this chaos is most puzzling and most wearisome to the lawyer who seeks his way among these enactments. Of the fifty-three effective sections of the chief of them, the Naval Prize Act, 1864,[2] one was repealed in 1894, and seventeen in 1914; in the latter year, also, amendments were made to two sections. And now the Prize Act of 1939 adds an additional section, amends nine others, and declares twelve more inapplicable in a certain class of cases. Clearly a reprint is desirable.

The main purpose of the Act of 1939 is to provide, as it does by section 1 (1), that "the law relating to prize shall apply in relation to aircraft and goods carried therein as it does in relation to ships and goods carried therein, and shall so apply notwithstanding that the aircraft is on or over land." Section 1 (2) provides that the amendments necessary for giving effect to this purpose, which are contained in Part I of the Schedule to the Act, shall be made in the Act of 1864, the Prize Courts (Procedure) Act, 1914,[3] and the Prize Courts Act, 1915.[4] For the most part these amendments are purely consequential. Thus definitions of the terms "aircraft papers" and "any of His Majesty's military aircraft" are added to the definition section (section 2) of the Act of 1864. Similarly it is provided that the sections of the latter Act relating to the custody of prize ships,[5] and the bringing in of their papers,[6] shall be amended so as to apply also to the custody of prize aircraft and the bringing in of aircraft papers. The section applying these provisions *mutatis mutandis* to prize goods[7] is likewise amended to the same effect. Again, the provisions governing prize salvage[8] and the application of Customs regulations to prize ships[9] are extended so as to embrace aircraft within their terms. A new section

[1] 2 & 3 Geo. VI, c. 65.
[2] 27 & 28 Vict., c. 25.
[3] 4 & 5 Geo. V, c. 13.
[4] 5 & 6 Geo. V, c. 57.
[5] 27 & 28 Vict., c. 25, s. 16.
[6] *Ibid.*, s. 17.
[7] *Ibid.*, s. 31.
[8] *Ibid.*, ss. 40 and 41.
[9] *Ibid.*, s.

section 48A) is introduced to regulate the making of Customs declarations by captors of prize aircraft. Equivalent adjustments are made in the provisions of the Act of 1864 defining the interests of captors in prizes;[10] in section 1 of the Prize Courts (Procedure) Act, 1914 (the chief effect of which is to enact that ships of war—and now military aircraft—taken as prize need not be delivered into the custody of the Marshal); and in section 3 of the Prize Courts Act, 1915, which deals with the power of the Court to transfer the *res* from the custody of an inferior court to that of its own Marshal.

But in one case this irritating process of consequential amendment would appear to have far-reaching—and perhaps unlooked-for—results. Section 2 of the Act of 1864 defines the term "Officers and Crew" as including "Flag Officers, Commanders, and other Officers, Engineers, Seamen, Marines, and others on board any of Her Majesty's Ships of War." After amendment this definition reads: "Flag Officers (etc. to:) Soldiers, airmen and others on board any of His Majesty's Ships of War *or any of His Majesty's military aircraft.*" Now the expression "Officers and Crew" appears but thrice in the sections of the Act which remain unrepealed. It appears in section 39, where it is provided that a prize taken by "any of the Officers and Crew of a Ship other than a Ship of War of Her Majesty" shall be a droit of Admiralty. There the use of the term is obviously untechnical. But it appears again in sections 42 and 43, which relate to the grant of prize bounty. There again the term is employed somewhat imprecisely, it being enacted that "If, in relation to any War, Her Majesty is pleased to declare . . . Her Intention to grant Prize Bounty to *the Officers and Crew of Her Ships of War*," such officers and crew as are present at the engagement shall be entitled among them to a bounty of £5 per man aboard an enemy armed ship taken or destroyed.[11] Likewise section 55 (1) lays down that nothing in the Act shall give to "*the Officers and Crew of any of Her Majesty's Ships of War*" any interest in any prize other than is granted by the Crown. Although "any of Her Majesty's Ships of War" is also a *terminus technicus* and does not include "any of His Majesty's military aircraft" which are separately defined by section 2 (as amended), it is nevertheless arguable that, in view of the amendment to the definition of "Officers and Crew," the crews of aircraft are also entitled to share in prize bounty.

This is one of the few general problems raised by the Act. In connection with it, it is to be noticed that sections 42 and 43 are among those sections of the Act of 1864 which are contained in Part II of the Schedule to the Act of 1939. Such sections are declared, by section 1 (3) of the latter Act, not to apply "in relation to *aircraft* or goods carried therein *taken as prize.*" It is thus clear that no prize bounty can be claimed in respect of an enemy military aircraft which is taken or destroyed. This is not serious for the sailor, for the £25 available for bringing down a bomber with a crew of five would not go far among a destroyer's crew of one hundred and fifty. But is the bomber's crew of five entitled to the windfall of £150 apiece which the sinking of an enemy destroyer would bring them? The Act gives little help in the question, and presumably it must remain unsolved until a grant of prize bounty is made and until a sea lawyer is found among the ranks of British airmen. It was held in *The Konigsberg*,[12]

[10] *Ibid.*, s. 55 (1).
[11] S. 42: the same term is used consequentially in s. 43.
[12]

a prize bounty claim of the last war, that, where an enemy cruiser w destroyed by naval vessels assisted by aircraft piloted by members the Royal Naval Air Service, the latter were entitled to share in the bounty earned. But that decision is not of much assistance, as the aircraft were specially detailed to aid the naval vessels and the names of their personnel were borne on the ships' books. If the problem here involved should ever come up for decision, there would have to be borne in mind the solemn words of Lord Stowell:- "Head-money is not property acquired in any manner by the Captor, or to be demanded on the ground of any antecedent title; it is a mere voluntary grant of public money, and the grantees must be content to take what is actually given and no more. The Court cannot amplify the grant by constructive analogy, and by so doing take upon itself the double impropriety of imputing blame to the legislature for a supposed omission and arrogating to itself the further disposal of public money. By every rule of interpretation that can apply to such a matter the Court is bound to confine its exposition within the very letter of the Statute, if that letter speaks an intelligible language."[13] Yet it may be that the letter of the statute speaks no intelligible language here.

The remaining sections excluded from application in relation to aircraft taken as prize deal with capture by land expeditions,[14] conjunct captures with allies,[15] pre-emption,[16] powers of the Prize Court in cases of irregular captures,[17] ransom, convoy,[18] and the regulation of Customs declarations by Captors;[19] the exclusion of this last section was unnecessary as aircraft were already separately provided for in this matter by the new section, section 48A. Finally, the operation of section 30 was excluded, and this raises another interesting point.

Section 30 provides that captors may include as many as six "small armed ships" in one adjudication. It obviously does not apply to aircraft for an "armed ship," though not defined by the Act of 1864, is defined by the Prize Court Rules, 1939,[20] as falling within the scope of the term "Ship of War" which, as has already been seen, does not include aircraft. Nevertheless, the exclusion of section 30 does raise the question as to whether enemy military aircraft are the subject of prize jurisdiction. It is not entirely settled that captured enemy warships are prize, but section 30 clearly contemplates proceedings for their condemnation. The same are contemplated equally by the Prize Court Rules, since a form of condemnation is provided.[21] And indeed, there are numerous reported decisions of proceedings in prize affecting enemy warships. But for the most part such proceedings are taken solely for the assessment of prize bounty.[22] It is not clear whether warships fall within the rule "All Prize must be judged," though it is expressly enacted that there is no need for them to be delivered up to the Marshal.[23] Nevertheless, the general impression conveyed by section 30 and various other provisions of the Act of 1864 is that warships

[13] *La Bellone*, 2 Dods, 343, 348.
[14] S. 34.
[15] S. 35.
[16] S. 38.
[17] Ss. 37 and 39.
[18] S. 46.
[19] S. 48.
[20] Order I.
[21] Appendix A, No. 53 (v) and (xxv) to (xxviii).
[22] Cf. Pearce Higgins in VI B.Y.I.L. (1925), 103, 108.
[23] 4 & 5 Geo. V, c. 13, s. 1 (

are at least capable of condemnation. In the case of enemy military aircraft taken as prize, the Act of 1939 provides likewise that they need not be delivered up to the Marshal. But the Prize Court Rules provide a form of condemnation.[24] Since the application of sections 42 and 43 is excluded in relation to them, there can, however, be no question of prize bounty where enemy military aircraft are taken or destroyed. Thus the impression is created that there is an obligation on the captors to bring in enemy military aircraft or their papers for adjudication.

It is apprehended that this is a correct interpretation of the Prize Court Rules and of the various enactments and authorities. But, if this be so, the result would be ludicrous. For it would mean that there would have to be prize proceedings in respect of every enemy aircraft captured or brought down! And, since no amendment has been made to section 30 of the Act of 1864 so as to extend its application to aircraft, there would have to be separate proceedings in respect of each aircraft. A respectable air-raid would overwhelm the Court with business! It should in fairness be added that prize proceedings are appropriate only where an aircraft is *taken as prize*,[25] and that crashing or shooting down by land defence guns (as distinct from ships' guns) would presumably not constitute a taking as prize. That notwithstanding, the doubt is substantial enough to strengthen very considerably the case for the reduction of the Prize Acts to some semblance of order.

The rest of the provisions of the Act of 1939 do not raise so many problems, though it may be suspected that some serious difficulties lie hidden behind the seemingly innocent words of section 3. That section declares "for the removal of doubts" that Colonial Courts of Admiralty (i.e. Courts in any British possession of unlimited civil jurisdiction which were invested with Admiralty jurisdiction by section 2 of the Colonial Courts of Admiralty Act, 1899[26]), Admiralty Courts set up outside British territory under section 12 of the Act of 1890, and Vice-Admiralty Courts set up under section 2 of the Prize Courts Act, 1894,[27] shall be Prize Courts within the meaning of the Act of 1864.

being jurisdiction in prize. To facilitate the application of the Act in protectorates, mandates and countries where the Crown has extra-territorial jurisdiction, the operation of the various enactments amended is likewise extended so as to include those places. The Act does not, it will be noticed, apply to Canada. But the Order bringing into force the new Prize Court Rules,[31] Canada having requested and consented to its making, applies thereto, but only to the extent that it revokes the Prize Court Rules of 1914.

By way of summary it may be said that the Act of 1939 has not produced, or at least was not intended to produce, vital changes in the law relating to prize. It is an enactment extraordinarily difficult to read and provides a striking demonstration of the danger and inconvenience of the pernicious practice of incorporation by reference.

[31] P.R. & O., dated 2nd September, 1939.

CLIVE PARRY.

NOTES OF CASES

Wages During Illness

In *Marrison* v. *Bell*, [1939] 1 All E.R. 745, annotated in 3 Mod. L.R. 162, it was decided that receipt of sickness benefit under the National Health Insurance Act, as distinct from receipt of compensation under the Workmen's Compensation Act, did not destroy the right to wages during illness. Not unnaturally this decision was believed to establish a right to wages during illness. This alarmed employers to such an extent that two test-actions were soon brought and in these decisions this belief has been declared fallacious. In the first action, *Petrie* v. *MacFisheries, Ltd.*, [1939] 56 T.L.R. 119, the case of the workman seemed to be even stronger than in *Marrison* v. *Bell* as he had not received any statutory payments but only half wages for twenty-one days paid as an act of grace in accordance with a practice communicated to the employees by notice. It could not be proved that the plaintiff had ever seen this notice, but it was not disputed that he was aware of the practice. On these facts it was held impossible to imply a term providing for full payment of wages during illness. The Court emphatically denied that a claim for wages could be founded on common law apart from contract. Nor had any such common law right been established by the decision in *Marrison* v. *Bell*. This case only dealt with the effect of statutory payments on the right to wages assuming the parties had agreed that wages should be payable during illness.

It may be doubted whether the plaintiff's knowledge of the practice of the defendants could fairly be construed as consent and also whether the Court in *Marrison* v. *Bell* conceived the right to wages as only founded on contract. It must, however, be admitted that in that case it was not necessary to determine the character of that right and that an attempt to found it on common law would have been a departure from former ideas and would have required qualifications in contracts which cannot reasonably be said to carry a right to wages during illness and in cases, such as those of agricultural labourers, where such a right is precluded by custom. By falling back on implied terms, however, the problem has been evaded rather than solved. The parties may not have thought about it at all and, as in other questions depending on implied intentions, the Court exercises a discretion in finding what the parties may be taken to have intended.

Is it to be presumed that it is intended to pay wages during illness or is the presumption the other way round? The answer is given by Atkinson, J., who points out that the County Court Judge in *Marrison* v. *Bell* had been wrong in laying down the rule "When off sick, in the absence of any express contract, no wages due" and that "the truer view was just the other way round." Similarly, du Parcq, L.J., states that in the absence of any indications to the contrary "it may be assumed that he is to be paid, and that it was the intention of the parties that he should be paid."

In spite of this benevolent presumption of the intention of the parties the present law is not satisfactory if the social justice of the claim to wages during illness be admitted since the presumption is easily rebutted, for instance, by unilateral "acts of grace" as in the present case. The doctrine of the implied term is derived from the notion of freedom of [illegible] of equality of bargaining

strength which is absent from the relation of master and servant. Like many other incidents of that relation the problem of wages during illness calls for statutory regulation.

After the claim to wages during illness had been reduced from its supposed common law basis to the much more insecure foundation of a presumption of fact, the decision in *Hancock* v. *B.S.A. Tools, Ltd.*, [1939] 4 All E.R. 538, seems to go even further and to exclude piece-workers from the operation of the presumption.

The decision can be satisfactorily explained on the ground that the evidence had established a custom in the particular trade preventing any claim for wages during illness. But Atkinson, J., whose judgment is best understood by reading it together with his judgment in the Court of Appeal in *Petrie* v. *MacFisheries, Ltd.*, adopts a broader ground which does not confine the rule laid down to the particular trade but extends its application to piece-work in general. Following the test laid down in *Smith's Leading Cases*, Vol. 2, p. 49, he distinguishes contracts where the consideration for wages is the actual performance of the work and contracts where the mere readiness and willingness to perform it, if of ability to do so, constitutes the consideration. This test appears to be open to the following objections—

In the first place, it has led the learned authors of *Smith's Leading Cases* to deny the right to receive wages during illness if the servant has received payments under the National Health Insurance Acts. This question has of course been settled differently in *Marrison* v. *Bell*.

Secondly, it treats the claim to wages during illness as dependent on the presence or absence of consideration, whereas the majority of the Courts in *Petrie's* case considered that it must depend solely on the presence or absence of an implied term, that is to say a promise by the master, without any doubt that such a promise if given might be unenforceable being unsupported by consideration.

Thirdly, it postulates that the consideration for wages is either work or readiness to work, whereas it would seem that the consideration for the promise to pay wages is the promise to serve. The difference between piece-work contracts and other contracts of employment lies not in the nature of the consideration provided by the servant but in the method of calculating the wages. Only this view, it is submitted, can explain the right of piece-workers to sue for wrongful dismissal or for failure to provide work (*Devonald* v. *Rosser & Sons*, [1906] 2 K.B. 728). In *Smith's Leading Cases* and in the judgment of Atkinson, J., a *dictum* by Greer, J., is quoted stating that the consideration for work is wages and the consideration for wages is work. But in that case—*Browning* v. *Crumlin Valley Collieries*, [1926] 1 K.B. 522—the master succeeded, not on the ground that no work had been done, but on the ground that through no fault of his no work could be done. The facts of the case and the context show that in that case Greer, J., was not speaking of consideration in the technical sense.

The judgment of Atkinson, J., in the present case is objected to not only because it fails to analyse correctly the contract of employment but because it invites dangerous generalisations denying wages during illness in piece-work contracts. It is submitted that the fact that wages are calculated in any particular manner, as by reference to the amount of work actually done or the time actually spent at work, does not of itself compel the conclusion that they are not payable during illness.

Nuisance, Negligence and the Overlapping of Torts

In the first number of this REVIEW the present writer has suggested that, in regard to a group of important torts, notably the actions for Negligence (with all its ramifications, such as liability for dangerous things), those of so-called strict liability (*Rylands* v. *Fletcher*, fire, animals) and Nuisance, the traditional analytical distinctions have lost much if not all of their former importance, that these torts frequently overlap and rationalisation seemed desirable. Subsequent judicial developments appear to lend point to this suggestion. In at least one recent case it is almost impossible to see whether the Court was examining the action under *Rylands* v. *Fletcher* or under Negligence (*Hanson* v. *Wearmouth Coal Co.* (55 T. L.R. 747), whereas in other cases the Courts had to resist attempts to plead exactly the same facts supported by identical arguments, first in Nuisance, then in Negligence. Practitioners and teachers of law are bound to feel increasing difficulty in maintaining distinctions which have lost most of their legal as well as of their social significance.

The basic difficulty appears to result from the fact that the modern judicial tests for negligent conduct and strict liability are, under the pressure of modern social and industrial developments, substantially the same. The problem is raised afresh, but not solved in the important decision of the Court of Appeal in *Wringe* v. *Cohen* (56 T.L.R. 101). The most careful study of the judgment which Atkinson, J., delivered for the Court, will only increase the doubt, in the mind of the reader, what, if any difference, there is between negligent conduct and strict liability, and, consequently, make it difficult to decide whether Nuisance demands proof of negligent conduct or not.

The plaintiff was the owner of a lock-up shop, and the defendant the owner of the adjoining house, the groundfloor of which was used as a shop. The house was considerably higher than the plaintiff's shop. The wall of the defendant's house, constituting the gable-end next to and above the plaintiff's shop, fell on and destroyed the roof of the shop. There was evidence that the pointing of the gable-end was very bad, the collaring perished, and the wall bulging, and that the wall had been in this defective state for three years. The defendant admitted that he was liable for repairs, by agreement with his tenant. A builder gave evidence that two years ago the defendant had asked him to look at the gable-end and that it looked in a fair state of repair then. Apart from that the defendant had done nothing, he had not himself examined or even looked at the defective parts.

The trial judge held that the wall was in a defective condition and a nuisance owing to the want of repair, that the defendant, being liable to repair, was under an absolute duty towards the plaintiff to keep his house in such repair that it did not become a nuisance, and awarded damages. The defendant appealed and contended that he would be liable only if it were found as a fact that he knew or ought to have known of the want of repair; that the judge did not so find, and the case ought therefore to be sent back for a new trial.

The Court of Appeal dismissed the Appeal (giving leave, however, to appeal to the House of Lords), and Atkinson, J., delivered a judgment for the Court which must be examined carefully.

After an examination of some earlier cases, which give little enlightenment either because they do not clearly state any principle, or because

reports are conflicting (*Pretty* v. *Bickmore* (8 L.R.C.P. 401),[1] Atkinson, J., mainly dealt with *Tarry* v. *Ashton* (1 Q.B.D. 314), and the more modern cases of *Barker* v. *Herbert* (1911), 2 K.B. 633), *Noble* v. *Harrison* (1926), 2 K.B. 332, *St. Anne's Well Brewery Co.* v. *Roberts* (44 T.L.R. 703), and *Wilchick* v. *Marks* (1934), 2 K.B. 56. All of these decisions Atkinson J., in the name of the Court, attempted to interpret as either expressly stating or reconcilable with the view adopted by the Court in the present case: that, if premises become dangerous as the result of something done by the occupier and cause damage, he is liable, although he did not know of the danger and was not negligent in not knowing. On the other hand, if premises become dangerous, not by the occupier's act nor neglect of duty, but as the result of the act of a third party or of a latent defect, the occupier is not liable without proof of knowledge or means of knowledge and failure to abate it.

It is submitted, with great respect—

1. that the case could and should have been decided on the ground of negligent commission of nuisance, which would have relieved the Court of its legal difficulties;

2. that the authorities discussed do not warrant the conclusions which Atkinson, J., drew from them;

3. that at least two important decisions binding upon the Court were not referred to;

4. that the legal proposition as formulated at the end of the decision is contradictory in itself.

1. The facts as found by the County Court Judge revealed that the defendant had done nothing more than to ask a builder, two years before, to look at the gable-end, when it appeared to the builder to be in a fair state of repair. Apparently the wall, which had been bulging for three years and the collapse of which caused the damage had never been examined within the last three years. Could there be clearer evidence of a breach of duty, of an omission of a repair the want of which the defendant knew or ought to have known? Most of the recent decisions on Nuisance actually came to the conclusion that the defendant, in the circumstances of the case, was not negligent, and therefore non-suited the plaintiff. But in *Wilchik* v. *Marks* (1934), 2 K.B. 56, Goddard, J., held the defendant liable for a defective shutter falling upon the plaintiff, when he had not, as the defendant in the present case, a duty to repair, but merely a right to inspect the premises. Accordingly the action should have succeeded either on Negligence or on Nuisance committed negligently. There was no need to send the case back for a new trial, since the facts were clear and sufficient to support judgment. That in every such case the plaintiff now has a choice between suing in Nuisance or Negligence, is confirmed by the concluding words in Mackinnon, L.J.'s, judgment in *Sedleigh-Denfield* v. *St. Joseph Society for Foreign Missions* (1939), A.E.R. 725. It is one instance of the overlapping of torts which modern developments has produced.

2. One need not subscribe to all the tenets of the American Realist school of Jurisprudence to be convinced that a modern Court often interprets precedents in such a way as to confirm a desired conclusion. This can be done by a selection of precedents as well as by relegating parts of judgments to dicta, or, on the other hand, lifting dicta, to integral parts of a judgment. If such liberty had not been exercised by the Courts in recent years, the

[1] Cf. 56 L.Q.R. 2.

law probably could not have developed judicially, as it has, and if there are lawyers who, for the sake of tradition, consistency and the sanctity of an analytical interpretation of the law, protest against such a view of legal evolution, they might reflect that the only alternative would have been a much more sweeping use of the legislative machinery, with the result that the Law Courts would have been entirely displaced from their time-honoured function of making new law while professing to apply the old one. It must, however, be pointed out that the interpretation of precedents by Atkinson, J., in the present case, seems to be a particularly strained one. It is true that *Tarry* v. *Ashton* lends itself to different interpretations. It is usually quoted in textbooks as an instance of cases in which, contrary to the rule, the master is liable for negligent conduct of an independent contractor. That rule, it is said, does not apply to acts on the highway.[2] It has, however, been suggested before[3] that the alleged rule of non-liability for independent contractors is a myth, surviving from former times. Were it otherwise, essential principles of liability would be stultified, which have been developed under the pressure of social conditions. The more the law of Tort emphasises the principle of responsibility for a *risque créé*, as part of the responsibility a manufacturer or a business man undertakes when he starts an enterprise likely to affect the public, the less application there is for the special rule about independent contractors. I do not know of any case, in recent years, when liability for a tort committed by an independent contractor has not been affirmed, under one or the other exceptions, such as extra-hazardous acts, duties imposed by statute, while in *Malania* v. *National Provincial Bank* (1936), A.E.R. 633, the Court of Appeal went so far as to make the principal liable for an ordinary nuisance committed by a contractor and incidental to the performance of his job. In the present case, Atkinson, J., attempted to interpret Blackburn, J., as having held that liability of the occupier was really absolute. It must be admitted that the judgment of that very eminent judge in this case has not the clarity characteristic of Blackburn, J. He obviously hesitated about the principle and was anxious to confine his judgment to the facts before him. But to read into it the interpretation which Atkinson, J., gave it, appears very difficult indeed. One passage in Blackburn, J.'s, judgment runs: "If he did investigate, and there was a latent defect which he could not discover, I doubt whether he would be liable; but if he discovers the defect and does not cure it, or if he did not discover what he ought on investigation to have discovered, then I think he would be clearly answerable for the consequences." To the significance of the "latent defect" which the Court, in the present case, attempted to reconcile within its general statement that the duty is absolute, we shall have to refer later.

To the present writer it seems difficult, if not impossible, to interpret the decisions of *Barker* v. *Herbert* (1911), 2 K.B. 633, *Pritchard* v. *Preto* (1917), 2 K.B. 173, *Noble* v. *Harrison* (1926), 2 K.B. 332, and *St. Anne's Well Brewery Co.* v. *Roberts* (44 T.L.R. 703) as saying anything but that liability depends on whether the occupier or owner, as the case may be, knew or ought to have known of the defect. That this should be the law, is also Professor Winfield's view (56 L.Q.R. 3). *Barker* v. *Herbert* was clearly decided on the ground that the defendant neither knew, nor, owing to the short interval, ought to have known of the removal of a rail which caused the nuisance. The appellant had contended that the defendant's duty was

[2] Cf. Salmond, 9th edition, sec. 31, 75.

absolute. As Atkinson, J., states himself, the three Lord Justices agreed in holding that the occupier was not liable if the dangerous state of the premises was due to the act of a trespasser, and not to any default of the occupier or those for whom he was responsible, unless he neglected to abate the danger for an undue time after he became or ought to have become aware of it. They denied in unmistakable terms the absolute duty contended for. Substantially the same proposition was repeated in *Pritchard* v. *Preto*. In *Noble* v. *Harrison* the defendant was held not liable for the damage caused by the fall of a tree branch due to a latent defect not discoverable by reasonably careful inspection. Both Rowlatt and Wright, JJ., stated the liability of an occupier in the clearest possible terms, as arising (1) "if he causes it, (2) if by the neglect of some duty he allows it to arise, (3) if, when it has arisen without his own act and default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it." In *St. Anne's Well Brewery's* case the defendants, as owners, were held not liable, for exactly the same reason, and to this perfectly clear line of authorities ought to be added two further decisions of the Court of Appeal, *Job Edwards* v. *Birmingham Navigation Co.* (1924), 1 K.B. 341, and *Sedleigh-Denfield* v. *St. Joseph Society for Foreign Missions* (1939), 1 A.E.R. 725 (C.A.).

In the former case the defendant's liability for the nuisance caused by a burning refuse heap was denied because they neither knew nor ought to have known of it, and it should be emphasised that Scrutton, L.J., who dissented, did not dissent on the principle, which indeed he reaffirmed in *St. Anne's Well Brewery's* case, but merely on the extent of the defendant's duty to look after their property. In the latter case the Court denied the liability of a landowner on whose property a County Council had laid insufficiently protected pipes the blocking of which caused a flood. There are, then, no fewer than four decisions of the Court of Appeal, binding, at least according to the prevalent opinion[4] upon itself, which clearly state a principle contrary to that formulated in the present case. On the other hand, *Tarry* v. *Ashton* gives no more than doubtful support.

Nor would the result be different if we distinguished between cases of public and private nuisance. The distinction seems tacitly to have been given up, for the present case was undoubtedly one of private nuisance, and so were *St. Anne's Well Brewery's*, *Job Edward's*, and *Sedleigh-Denfield's* cases. On the other hand, *Tarry* v. *Ashton*, *Barker* v. *Herbert*, *Noble* v. *Harrison* were undoubtedly cases of public nuisance. As for *Wilchick* v. *Marks* (1934), 2 K.B. 56, where a passer-by was injured by a shutter falling from the defendant's house, the present writer has never been able to find out whether it was decided as a case of public nuisance or under the rule of *Donoghue* v. *Stevenson*. The duty was derived from proximity, but textbooks appear to treat it as a case of nuisance,[5] and that is further evidence for the proposition that the actions are now practically interchangeable. As for the distinction between private and public nuisances, there is no reason why it should be of any juristic significance in the law of tort, which always presupposes that damage has been caused to the plaintiff by a nuisance caused by the defendant. In the one case the breach of duty is towards the plaintiff as a member of the public entitled to use the highway, in the other towards the occupier of neighbouring property. If ever there was a difference in the standard of these two duties, the Courts have

[4] Cf. 3 M.L.R. 66.

[5] But cf. the reference in S[illegible]

certainly given it up, as the previously discussed cases show. This bears out Professor Winfield's contention that damage caused by public nuisance is a case of private nuisance.[6]

4. The Court limited its proposition of the absolute liability of the occupier by the qualifying statement that there was no liability if the danger resulted from the act of a third party or a latent defect. As for the act of a third party, this is something outside the control of the defendant, and such act excludes liability in every tort, strict or otherwise (*Donoghue* v. *Stevenson*, *Rylands* v. *Fletcher*, Nuisance, Animals, etc.). But the exclusion of liability in case of a latent defect virtually deprives the main proposition of its significance. For it can hardly be imagined that any damage caused neither by the act of a third person nor by a latent defect could be due to anything but knowledge or negligence of the occupier. All the cases quoted by the Court are thus explained. In *Barker* v. *Herbert* it was the act of a stranger, in *Pritchard* v. *Preto*, *Noble* v. *Harrison*, *St. Anne's Well Brewery's* case the latency of the defect which absolved the defendant, and the only doubt could arise from *Job Edwards'* case, which the Court did not refer to. Even there it was the act of a stranger which caused the nuisance, but Scrutton, L.J., rightly dissented from the majority in thinking that the occupiers ought to have taken notice of a big fire which had been smouldering for some time.

The present decision can thus hardly be said to have contributed to a clarification of the problem of liability in Nuisance. But, it is submitted, the problem is incapable of solution, as long as a distinction between strict and non-strict liability is preserved which modern social developments have made meaningless. These developments are fully reflected in the law, except that the last step of co-ordinating the various torts in a common principle, infinitely desirable for the practice as well as the learning of the law, has not been taken. It would seem to be easy to unite this group of torts, comprising probably Negligence, Trespass on and off the Highway, Statutory Duties, Nuisance, *Rylands* v. *Fletcher*, Liability for animals (except for cattle trespass), for fire, and the various aspects of liability for dangerous things or premises, under a common formula. *Rylands* v. *Fletcher* could to-day be decided as a case of Negligence,[7] and the modern action in Negligence is if anything stricter than the rule of *Rylands* v. *Fletcher* (cf. *North-western Utilities* case, and comment in 1 M.L.R. 39). In the case of statutory duties the standard of Negligence is fixed by statute (*Lochgelly Iron and Coal Co.* v. *M'Mullan* (1934), A.C. 1). There is no reason why the *scienter* rule should be anything but an aspect of Negligence in regard to the keeping of animals. Liability for independent contractors is no longer a test by which to distinguish strict torts from others. The rule of *res ipsa loquitur* has, in many cases, operated to shift the burden of evidence on to the defendant and thus to eliminate another difference between actions brought under Negligence or under a strict tort. It is, of course, impossible to elaborate the suggestion in more detail,[8] but the task will have to be undertaken sooner or later. And it would be of more than mere juristic importance, it would give articulate expression to what English law has in fact already recognised, that modern liability in tort is, to a large extent, no longer based on individual fault, but on a standard of conduct which is a corollary of social responsibility.

W. FRIEDMANN.

[6] Law of Tort, p. 466/67.

[7] Cf. Dr. Stallybrass, in Salmond, 9th edition, sec. 149.

Delivery of a Donatio Mortis Causa

From the time of its reception from the Civil law the *donatio mortis causa* has always had an uneasy lodgment in English equity. In *Darlow* v. *Sparks* (1938, 54 T.L.R. 627) Bennett, J., said that "it seemed difficult to ascertain whether there was any clear principle on which the Courts had acted in deciding whether a document was or was not the subject of a *donatio mortis causa.*" He held that National Saving Certificates could pass in this way being substantially indistinguishable from deposits in the Post Office Savings Bank which has been allowed to pass in *Re Weston* (1902, 1 Ch. 680): "That decision had been based on the ground that the test appeared to be whether or not the document, besides acknowledging the receipt of the money, expressed the terms on which it was held and showed what the contract between the parties was." The same test was applied by Luxmoore, L.J., sitting at first instance, in *Delgoffe* v. *Fader* (1939, Ch. 922, 928). A bank deposit account book did not satisfy the test, though delivery of a banker's deposit note has several times been held sufficient to pass the amount on deposit by *donatio mortis causa.*

This test is a comparatively modern one and it is not certain whether it is the exclusive test of the validity of such gifts. The truth is that equity has changed its policy with regard to *donationes mortis causa.* They were at first only cautiously allowed and now, when the delivery of a number of documents sharing few characteristics has come to be held sufficient, there is no obvious principle common to them all. Several stages in this development can be noticed.

1. Before Lord Hardwicke held in *Snellgrove* v. *Baily* (1744, 3 Atk. 214) that a bond is a good subject of a *donatio* the law was uncertain, but the general opinion was that not only delivery but a transfer of title was required. At first equity refused to perfect an imperfect gift *mortis causa* as well as *inter vivos*: it refused, as it no longer does, to treat the executor or administrator as a trustee for the donee whose title is imperfect at law. Thus in *Parthrick* v. *Freind* (1725, 2 Coll. 362 *n*) Jekyll, M.R., did not allow delivery of bonds to amount to a death-bed gift partly because it was not made in contemplation of death "and partly because the bonds were *choses en action,* and the delivery thereof did not vest a legal property in the money." He took the same view with regard to a note not payable to bearer in the better-known case of *Miller* v. *Miller* (1735, 3 P.Wms. 356, 358).

2. But bonds, although they are *choses in action,* were permitted by Lord Hardwicke with some reluctance. With reference to *Snellgrove* v. *Baily* he said: "If I went too far in that case, it is not a reason I should go further, and I choose to stop there" (*Ward* v. *Turner* (1752, 2 Ves. Sen. 431, 442)). In the latter case he held that the delivery of receipts for annuities was not sufficient and explained that a bond, being a specialty, was in a peculiar position: The person to whom a specialty is given may cancel or destroy it, the consequence of which is that he is given the power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a profert *in curiam.* The donee may thus prevent the personal representative of the donor-testator from recovering on the bond. Apart from the much criticised case of *Lawson* v. *Lawson* (1718, 1 P.Wms. 441) there seems to be no instance of a thing in action other than a bond or deed passing as a *donatio mortis causa* until

3. In the last-mentioned case Lord Eldon pointed out that the doctrine relating to profert had become less strict than it was in Lord Hardwicke's time: equity had developed its doctrine relating to lost instruments. This change was made to justify the ruling in *Moore* v. *Darton* (1851, 4 De G. & Sm. 517) which is the turning point in the history of the subject. It was there held by Knight Bruce, V.C., that the delivery by the lender to the borrower of a receipt for the loan containing the terms of the debt was a sufficient *donatio* of the sum lent. The Vice-Chancellor admitted that "the delivery of a bond is not the delivery of the mere evidence of a debt, for it is the delivery of that without which the debt would not have been a specialty" and that the earlier cases had not gone to the length of deciding that the delivery of the mere evidence of a debt would be sufficient. But he stressed the fact that the rules about proof of a specialty debt had been relaxed. Further, he was able to hold that the receipt was "something more" than mere evidence of the debt. A debt would have arisen without any writing but it would not have carried interest without a contract to that effect: such a contract could have been made orally but the document before him contained the terms relating to the interest payable. Hence, in practice, the position was similar to that of a bond: as the particular contract "was created by writing, proof of the writing, if possible, was essential to recovery upon the contract. This writing was therefore in a sense essential to the proof of the contract; and it is this writing which was in substance delivered *mortis causa* to the person owing the money."

4. It has been found difficult to apply this evidentiary test of sufficient delivery in the modern cases. There is in the cases hardly a consistent treatment of the multifarious documents that have come before the Courts. *Moore* v. *Darton* itself is a strong case for the donee himself was the person bound by the document; but it is quite clear at the present day that this factor is by no means essential. There are suggestions of different tests from the one applied in that case. In *Re Weston* (1902, 1 Ch. 680, 683) Byrne, J., asked: "Is not the true test this—Has the donor done all in his power to transfer the property?" But this suggestion is unsound: "I apprehend that really the question does not turn at all upon what the donor could do, or what the donor could not do; but if it was a good *donatio mortis causa*, what the donee of that donor could call upon the representatives of the donor to do after the death of that donor." This is the opinion of Lord Eldon in *Duffield* v. *Elwes* (*op. cit.*, 530, 531). Byrne, J., seems to have been thinking of a similar test that has been applied to the assignment of *choses in action* in equity. But the law on that subject is not in point any more than the maxim, "equity will not perfect an imperfect gift." In *Re Craven's Estate* (1937, Ch. 423, 428) Farwell, J., said: "It seems to me that there must be such a parting with the dominion over the chattels or the property as to prevent the subject-matter of the *donatio* being dealt with by the donor in the interval between the *donatio* and either the death or the return of the articles by the donee to the donor." In this case the donee had been given a power of attorney over certain securities and authorised to have them transferred into his own name: as they had been so transferred the *donatio* was upheld. It is clearly insufficient to grant a power which is not acted upon, nor can shares in a company be transferred by delivery of the share certificates. But it hardly seems necessary to go so far as to say, with Farwell, J., that

the case of things in action. It appears to be sufficient if he makes it more difficult for him to deal with it. As Luxmoore, L.J., said in *Delgoffe* v. *Fader* (*op. cit.*, 927): "There must be delivery of the subject-matter of the gift to the donee, or, I think, a transfer of the means of, *or part of the means of*, getting at the property." A transfer of the evidence of the thing in action is covered by this statement. Yet shares cannot pass by delivery of the share certificates because, unlike National Saving Certificates, they do not contain substantially all the terms of the contract.

"The effect of these nice distinctions is to increase litigation, because no advice can be given in such a state of the law." This statement of counsel in *Duffield* v. *Elwes* (*op. cit.*, 508) is also true at the present day. It is gratifying for a writer in this REVIEW to note that Lord Eldon's desire for reform was not confined to the abolition of trial by battle; he also favoured a forward policy with regard to the *donatio mortis causa*: "Improvements in the law, or some things which have been considered improvements, have been lately proposed; and if, among those things called improvements, this *donatio mortis causa* was struck out of our law altogether, it would be quite as well" (*ibid.* 533).

W. H. D. WINDER.

The Rule in Russell v. Russell

The reluctance of experienced divorce judges to apply *Russell* v. *Russell*, [1924] A.C. 687, which prevents spouses from giving evidence of non-access in divorce proceedings, led to the growth of many exceptions to the rule, but the Court of Appeal in *Ettenfield* v. *Ettenfield*, [1940] 1 All E.R. 293, has stopped this tendency and reaffirmed the rule in its most uncompromising form. Speaking through Goddard, L.J., the Court said (at p. 301)—

> "The rule that evidence tending to bastardise or legitimise a child conceived and born during wedlock cannot be given by either spouse is absolute, and applies, not only where the parties are living together, but also when they are separated either by a decree of a court of competent jurisdiction or by their own volition."

In order to reach this conclusion, they had to overrule *Mart* v. *Mart*, [1926] P. 24, and *Stafford* v. *Kidd*, [1937] 1 K.B. 395, as well as limiting the scope of *Hetherington* v. *Hetherington* (1887), 12 P.D. 112, which was explained as follows (at p. 298)—

> "It decided that, where spouses are separated by sentence of divorce *a mensa et thoro*, children born to the woman during the separation are presumed to be bastards, but that, if the parties separate without a sentence—that is, voluntarily—the presumption is that the children are legitimate until the contrary is proved. There is not a word in this case to suggest that the spouses were competent witnesses either to prove or to disprove legitimacy."

Though the first of these statements is correct, it is submitted that neither of the two which follow can be supported.

In the first place, there is absolutely no discussion in that case of the position which arises where the parties separate voluntarily, and the authority, such as it is, for the proposition that unless the spouses are parted by order of a Court there is a presumption of legitimacy, has to be sought elsewhere, particularly in *Morris* v. *Davies* (1837), 5 Cl. & F. 163, and *Inter the Parishes of St. George and St. Margaret, Westminster* (1706), [illegible] 123.

The latter case, according to Goddard, L.J. (at 297), "formed the foundation of the judgment of Sir James Hannen, P., in *Hetherington* v. *Hetherington*," so that we are a little surprised to find no mention of it in two out of the three reports of the learned President's judgment. It was a settlement case in which a woman, after being divorced *a mensa et thoro* from her husband, lived with and had children by another man; the Court said—

> "When a woman is separated from her husband by such a divorce, the children she has during the separation are bastards; for we will intend a due obedience to the sentence, unless the contrary be shewed; but if baron and feme without sentence part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved; for access shall be intended: but if a special verdict find the man had no access, it is a bastard."

The remarks about the presumption of legitimacy where the spouses separate voluntarily are *obiter*. It is, moreover, clear that the Court was not considering the position when the spouses lived apart under a separation agreement; indeed, it would have been remarkable if it had, for separation agreements were generally viewed with disfavour as being contrary to public policy and were regarded as unenforceable, at least in equity, except for such parts as dealt with matters of property, down until 1862 (*Westmeath* v. *Westmeath* (1821), Jac. 126, 142; see Lord Atkin in *Hyman* v. *Hyman*, [1929] A.C. 601, 625). But now that such agreements are enforced by the Courts, why should obedience to them not be presumed just as much as to decrees of the Court? *Morris* v. *Davies* is a stronger case, for though the parties were separated by deed, the House of Lords did not regard that as being material and reaffirmed the statement of the judges in the *Banbury Peerage Case* (1811), 1 Sim. & St. 153, 158, that where a husband and wife are not separated by divorce *a mensa et thoro* sexual intercourse between them is presumed to have taken place, with the result that any child born to the woman is presumed to be legitimate. But *Morris* v. *Davies* was a Chancery case decided by Chancery Law Lords at a time (1837) when Chancery was still refusing to give full effect to separation deeds, so that it can scarcely be considered as conclusive to-day. The Lord Chief Justice was correct when he said in *Stafford* v. *Kidd*, [1937] 1 K.B. 395, 400, that "*Morris* v. *Davies* belongs to a period when divorce (*sc. a mensa et thoro*) alone could get rid of the presumption of legitimacy," and that "the chronology makes an important difference, and the more recent decisions . . . are the guides which at this date the Court ought to follow." Moreover, *Morris* v. *Davies* must be read in the light of Lord Blackburn's remarks in the *Aylesford Peerage Case* (1885), 11 App. Cas. 1, 16, where he said—

> "I will only observe that in this case no question whatever arises as to those presumptions which follow from the existence of matrimony as to the birth of children *whilst the husband and wife are living together*" (italics supplied).

It seems, therefore, that the Court of Appeal was not bound by authority to hold that where the spouses live apart under a separation agreement children born to the women are presumed to be legitimate.

Secondly, it is incorrect to say of *Hetherington* v. *Hetherington* that "it has nothing to do with the competency of the spouses to give evidence" (p. [illegible]). In that case the spouses were living apart under a separation order

and the magistrates had refused to admit the husband's evidence of non-access and the wife's admission that he was not the father of the child. The comment of Hannen, P., on this exclusion was as follows (12 P.D. at 114)—

> "Unfortunately in refusing to act *on the evidence of the parties* they seem to have been under the impression that the issue was one of bastardy, which it was not, but one of adultery" (italics supplied).

The necessary implication to be drawn from this statement is that the spouses can give evidence of non-access in proceedings concerning adultery, though not bastardy. Originally, as Wigmore has shown (*Evidence*, second edition, s. 2063)—

> "That the fact of non-access, of itself, was a thing not proper to be testified to, either on moral or sentimental grounds, or that the parents could not testify to illegitimacy, never for a moment occurred to these judicial expounders of the common law,"

nor was there any rule in the Ecclesiastical Courts which excluded such evidence. It was an innovation when Lord Mansfield held in *Goodright* v. *Moss* (1777), 2 Cowp. 591, that decency, morality and policy prevented the Courts from allowing spouses to deny intercourse so as to bastardise issue, and this innovation was confined to proceedings in which legitimacy was the main question till the House of Lords saw fit to extend it to divorce proceedings in *Russell* v. *Russell*. In that case the parties were actually living together, but now the Court of Appeal has said that spouses cannot give evidence of non-access even when they are living apart under an order of the Court or a separation agreement.

The rule in *Russell* v. *Russell* is difficult enough to justify when the spouses are living together, as Lord Sumner's powerful dissenting judgment shows, but it is insupportable where the spouses are living apart, whether by agreement or by order of the Court. According to Lord Birkenhead in that case ([1924] A.C. 687, 698), evidence of non-access is excluded because it would tend "to invade the very special sanctity inherent in the conjugal relation." It is difficult to ascertain what conjugal relation there was between the parties in *Ettenfield* v. *Ettenfield* which could be violated. The matrimonial life had been broken up and there had been no *consortium* for over twenty months before the child was born, so that the parties were husband and wife in name only. In *Fender* v. *Mildmay*, [1938] A.C. 1, where a promise of marriage was made to the appellant by a man after his wife had obtained a decree *nisi* against him, the House of Lords adopted a practical approach to the question, and it is to be hoped that if and when *Ettenfield* v. *Ettenfield* comes before them, they will show the same aptitude for looking facts in the face.

D. W. Logan.

Alien Enemies

Geiringer v. *Swiss Bank Corporation, Oesterreichische Creditanstalt* v. *Geiringer*, [1940] W.N. 46, [1940] 1 All E.R. 406. This, the first decision of the present war as to the position of alien enemies, adds nothing to the law on the subject. Nevertheless, the point involved was a curious one. In April, 1939, the plaintiff Geiringer, who was resident in New York, commenced an action against the London office of a Swiss bank for a

he also applied for an order that the securities or the proceeds of their sale should be delivered to him. The defendants interpleaded, deposing that they had originally held the securities in dispute for the account of their Zurich office but that, in July, 1938, they had been instructed by the latter to transfer them to the account of the Vienna office of the claimants, the Oesterreichische Creditanstalt, a company incorporated under the laws of Germany. The Master granted an interpleader order for the trial as between the plaintiff and the claimants of the issue as to which of them was entitled to recover the proceeds of the sale of the securities. The order provided that the claimants should be plaintiffs in the issue, and the plaintiff in the action defendant.

Notwithstanding that war had meanwhile broken out between Great Britain and Germany, the claimants delivered their points of claim in the issue on 7th October, 1939. The plaintiff thereupon asked for an order for security of costs on the ground that the claimants were not within the jurisdiction; alternatively he sought that the claimants might be for ever barred against the defendants in the action.

Bennett, J., was of opinion that it would be unfair to make an order for security of costs, with which the claimants obviously could not comply. For, as the claimants were admittedly alien enemies, they could not proceed with their claim during the period of the war. Equally, it would be unfair to make the order asked for in the alternative. Notwithstanding that such an order would not determine the rights of the claimants against the plaintiff in the action, it would enable the latter to obtain possession of the securities in dispute and thus would, or might, prejudice the claimants. It might put them in a position in which they might have to sue the plaintiff, of whose solvency nothing was known, in the United States; it would certainly deprive them of any action against the Swiss Bank, which was in a sound financial position. On the other hand, it would not be right to leave the plaintiff without a remedy during the war, since this would harm him if his claim were good, and would benefit the enemy claimants if it were not good. It would have been possible to re-frame the issue so that the plaintiff in the action became also plaintiff therein. But this course had already been suggested by the Master to the plaintiff, who had refused to take it. All that the Court could do, therefore, was to dismiss the summons before it, giving the plaintiff leave to appeal to the Court of Appeal.

The decision turns upon questions which are, for the most part, purely technical. Yet it is to be noticed that the fact that the plaintiff himself was not within the jurisdiction is not necessarily of much importance. As is well known, the general rule of English law is that an alien enemy cannot in any circumstances sue. It was held as long ago as 1794 that it made no difference if the action could in no case put money into the pocket of the enemy plaintiff.[1] A qualification upon the general rule was admitted by the House of Lords in the case of *Rodriquez* v. *Speyer*.[2] The head-note to that case merely states that the general rule does not apply to "an action in which, for the purposes of winding up the affairs of a (*semble:* English) partnership dissolved on the outbreak of war by reason of one of the partners having become an alien enemy, the latter is joined as a co-plaintiff." But the exception is clearly wider than this: it is not limited to partnership, nor to cases where the co-plaintiffs are British

[1] *Brandon* v. *Nesbitt*, 6 T.R. 23.

subjects. Lord Finlay, L.C., in his judgment, stated that "If . . . to prevent an alien enemy from being a party to an action as plaintiff would do much more harm to British subjects *or to friendly neutrals* than to the enemy, this is a consideration more material to be taken into account in determining whether such a case falls within the true scope and extent of the rule [that an alien enemy cannot sue]."[3] Presumably the learned judge took the view that no such consideration existed here; but the point was not referred to. The difficulty caused by the claimant's inability to sue could have been surmounted by the plaintiff agreeing to the scheme suggested by the Master—that he should be made plaintiff in the interpleader issue as well. Possibly that would have made some difference to his rights in that he himself might have been required to furnish security for costs, and in that the onus of proof would be shifted to him. But, if he had faith in his claim, these differences would not have been very serious.

CLIVE PARRY.

Taxation of Company Profits

Although *Cull* v. *Inland Revenue*, [1940] A. C.51 turned upon the narrow technical interpretation of a minor section in the Income Tax code, it provides a pendant upon which to consider the basis of taxation of corporate bodies and their shareholders. Rule 1 of the All Schedules Rules, Income Tax Act, 1918, provides that a body of persons—which term statutorily comprehends a limited company—shall be charged to income tax in the same way as any other person; Rule 20 of the same Rules, re-enacting in almost identical terms similar provisions in the Income Tax Act, 1842, provides that upon payment of dividends, etc., to its shareholders, a company is entitled (but not bound—A.F.) to deduct tax at the rate appropriate to the dividends. The origin of this rule is, probably, that in 1842 a joint-stock company was regarded somewhat in the light of a large partnership so that payment of the tax due upon its profits by the company would be regarded as discharging the quasi-partners from any further liability to direct assessment to tax on their dividends; the analogy with a partnership was carried further by allowing the company to recover from its shareholders a proportionate amount of the tax it had borne. For many years after 1842 the company was regarded as paying the tax as *agent* for its shareholders, cf. *Gilbertson* v. *Fergusson* (1881), 7 Q.B.D. 562. Since, however, a company is statutorily chargeable upon its profits as a "person" and since it is an entity distinct from its shareholders— *Salomon & Co.* v *Solomon*, [1897] A.C.22—it is clear that this theory could not hold water and it has long been discredited *vide*, for example, Viscount Cave, L.C., in *Inland Revenue* v. *Blott*, [1921] 2 A.C. 171, 201, where he said: ". . . a company paying tax, does not pay tax as agent for the shareholders but as a taxpayer. . ." and similar dicta in *Inland Revenue* v. *Dalgety & Co., Ltd.*, [1930] A.C. 257, *Inland Revenue* v. *Neuman*, [1934] A.C. 215 and the instant case. The shareholders are thus not liable to be assessed again to income tax upon their dividends but are entitled, if their personal circumstances so permit, to claim from the Revenue repayment of tax, in whole or in part, suffered by them. For the purposes of Sur-tax, however, the shareholder is liable to pay upon the gross amount of the dividend before deduction of tax—this is, of course, equitable since a company is not liable to Sur-tax and no question of double taxation can arise.

[3] *Ibid.*, 66.

Cull's case turned upon the interpretation of Section 7 (2) Finance Act, 1931, which provides that "a dividend paid out of profits or gains shall be deemed to represent the amount of income which after deduction of tax under Rule 20 All Schedules Rules equals the *net* amount received"; it was held that the House of Lords was bound by its prior decision in *Neuman's* case (*cf. supra*) which had seemed to turn on its own particular facts and that where a dividend was paid "without deduction of tax" the amount to be taken into account for the purpose of the shareholder's liability to Sur-tax was the *actual* amount received by him and not the larger "grossed-up" sum which after deduction of tax would yield the actual sum received by him. It should be noted in this regard that a dividend paid "free of tax" has long been regarded by the Courts—following the decision in *Ashton Gas Co.* v. *Attorney-General*, [1906] A.C. 10—as the equivalent for income tax purposes of a gross dividend amounting, after deduction of tax, to the net amount received. It is thus open to a company to vary the liability of its shareholders to Sur-tax by the mode in which it pays its dividends, i.e. less tax or "free of tax" or, alternatively, "without deduction of tax"; the purpose of the Legislature in enacting Section 7, Finance Act, 1931, which was intended to avoid such anomalies, is thus vitiated by the decision in *Cull's* case and we may expect the defect to be remedied by Parliament in the next Finance Act—it is obviously incongruous that the *ex-parte* act of, say, a private company should operate to place its shareholders in a better position than those of a public company where both receive the same *net* dividend. It may also be observed that, if the decision remains, the small shareholder who receives a dividend "without deduction of tax" will not be entitled to claim repayment since he will have suffered no deduction of tax!

The House of Lords at the same time as it gave its decision in *Cull's* case also considered—in *Barnes* v. *Hutchinson*, [1940] A.C. 81—a contention by the taxpayer-respondent that, where a foreign company, of which he was a shareholder, had received dividends under deduction of tax from British companies, he was entitled to be relieved from direct taxation on his dividend proportionately to the amounts of income of the foreign company which had, and had not, borne British income tax—otherwise, it was argued he would, to an extent, be doubly taxed on the same source of income. The taxpayer relied on *Gilbertson* v. *Fergusson* (1881), 7 Q.B.D. 562, a somewhat similar case but decided under the now exploded theory that a company paid income as agent for its shareholders (*cf. supra*). The House of Lords gave the contention short shift, holding, in effect, that there were two entirely distinct incomes under review, viz. the foreign company's aggregate income, including the British dividends, and the respondent's dividends from his holding in the foreign company; these latter could in no sense be said to have borne British income tax—the *same* income had not suffered double taxation, so that no relief was due. A fuller account of *Barnes'* case than space will here allow will be found at 56 L.Q.R. 24/6.

A. FARNSWORTH.

Depreciation Allowances

In the assessment of business profits for the purposes of the Income Tax Acts, any deduction or allowance for capital expended, or used up, is forbidden: this prohibition has long been held to prevent any allowance

in his accounts and thereby reduce the amount available for distribution, see, *inter alia*, *Coltness Iron Co.* v. *Black* (1881), 6 App. Cas. 315, and *Aliauza & Co., Ltd.* v. *Bell*, [1906] A.C. 18. Parliament has made two breaches in this rule, firstly, by way of an allowance (dating from 1878), in computing profits, in respect of the diminished value of plant and machinery by reason of wear and tear, and, secondly, since 1918, an arbitrary allowance, calculated on annual value, in respect of premises used as mills, factories, or for like purposes; this latter allowance is meant to provide for the exceptional depreciation caused to such properties by the vibration of the machinery. Business men have long complained of the inequity of charging them in full on the profits derived from "wasting assets" but, despite a favourable recommendation by the Royal Commission on the Income Tax (1920—Cmd. 615—pp. 41/8), Parliament has been adamant in refusing any relief.

Until 1937 the allowance for depreciation of buildings was confined to the owner-occupier of the premises housing the machinery but, by Section 15 (5) of the Finance Act of that year, this was extended to a tenant-occupier of such premises who, under the covenants to repair contained in his lease, bore "*the whole of the burden of any depreciation of the property.*" In *Boarland* v. *Pirie Appleton & Co.* and *Stemco Ltd.* v. *Inland Revenue* (1940), 1 All E.R. 539, the Courts had to consider the interpretation of this sub-section; in the former case the whole burden of *maintenance* fell on the tenant with a saving for general failure of the structure while, in the latter case, there was the usual strict covenant to repair save that the landlord undertook to maintain the heating apparatus. It was argued for the taxpayers that the sub-section should be interpreted liberally since there never was a lease and never were covenants to repair which threw "the whole burden of the depreciation of the property" on the tenant; thus the relief given by the sub-section, if it was strictly construed, could never be operative. Wrottesley, J., held that the literal meaning of the words could not be departed from and, further, observed that there was no real hardship on the tenant-occupier in such cases since he was allowed, in computing his taxable profits, to deduct the extra cost of maintenance and repair due to the excessive vibration of the machinery; the resulting fall in the value of the factory fell—as regards the leases under review—not on the tenant but on the owner when the lease had expired; since the tenant suffered no loss by reason of the depreciation of the property, he was under no injustice. The decision seems unimpeachable and the objection that there are no leases to which the sub-section can be applied is empty of content since it should be easy to provide appropriate words, in that section of a lease containing the covenants to repair, whereby the tenant undertook to bear the whole cost of the depreciation of the property; whether the taxpayer would gain on balance is very much open to doubt as the comparatively small saving in tax would probably be incommensurable with the heavy liability arising at the termination of the lease.

A. FARNSWORTH.

Trust or Contract? Deeds in Equity

The perpetual fact that the same transaction may have a different effect according as the principles of the common law or equity are applied is given an unusual illustration in *Naas* v. *Westminster Bank Ltd.* (1940, 1 All. E.R. 485). The variance was not caused by any conflict of principle but arose because the majority [redacted]

of the formation of contract and the House of Lords in terms of a declaration of trust. The case also provides a view of one of those semi-extinct creatures of equity whose rare advent is still able to excite the curiosity of common law judges.

The somewhat complicated facts may be summarised as follows. In a deed executed in 1923 A covenanted to pay Miss W a weekly sum to be applied to the maintenance of herself and a son then expected to be, and afterwards in fact, born. By that deed A had an option to execute a settlement by which similar benefits should be secured to W and the son, such settlement to be in satisfaction of the weekly sum payable under the deed. A settlement was engrossed to which A and W were parties, the plaintiff bank being also named as a party as the trustee. The settlement secured benefits similar to those in the deed of 1923, and further contained a release of the covenant in that deed. After being executed by A the settlement was unconditionally delivered to W, but neither she nor the bank ever executed it. The property settled was India stock in the bank's name. After the execution of the settlement this was sold by the bank and the proceeds paid to A. W sought a declaration that the handing over of the proceeds of sale constituted a breach of trust.

Although there was no question of the settlement having been delivered as an escrow Scott and Clauson, L.JJ., in the Court of Appeal (1938, 3 All E.R. 652) felt able to refuse the declaration asked for. In the words of Lord Russell of Killowen they appeared "to have dealt with the matter as if it lay in contract and was governed by the rules as to offer and acceptance, with time being in some way of the essence of the contract, whereas the case is really one of a divesting and vesting of property" (p. 499). Once the settlor signed, sealed and unconditionally delivered the deed, the trusts in favour of the appellants were constituted: they became the persons beneficially interested in the stock and the settlor had no power to revoke the trusts unless such a power was contained in the settlement. Any question of consideration was irrelevant. "In the opinion of Scott and Clauson, L.JJ., however, that is not its true effect in law. In their view, it was not intended to be a unilateral declaration of trust which would have effect whether or not the first appellant executed it, but was to be construed as a consensual document, requiring for its operation that the first appellant should concur in it by executing it" (per Lord Wright, p. 508). This view of the Court of Appeal was not based on any express condition precedent but on the supposition that the intention was to create the trust only if it superseded the obligations under the earlier deed of covenant and that this supersession could only be effected by the execution of the settlement. According to Lord Wright the Court below had assumed that "the position was analogous to that which arises when one party makes a written offer to another party and the latter does nothing more. There, it is said, there is no acceptance, no consensus, and no legal result." This view was unanimously rejected by the House of Lords. It might have been expected that W would execute the settlement, but it was not a condition of the settlement, which was unilateral. "I think it is misleading to import into the law of deeds analogies from an entirely different region of law—namely, that of simple contracts. They, indeed, are consensual, and depend on a meeting of minds in a common intent, evidenced by words or conduct. It is from this mutual consent that the rights and duties under the agreement arise. This might be the position in a case of [illegible] but the deed in question is some-

thing different. The declaration of trust by the settlor depended, not on the other party's consent, any more than on mutual consideration, but on an act of the settlor in executing the settlement." While there are difficulties in the analysis of a simple contract as a meeting of the minds of the contractors, this is a welcome warning by Lord Wright against the dangers of twisting every "contract" into an offer and an acceptance. As he points out, the law as to obligations or transfers under seal was fixed in days before the nature of the consensual contract was realised. The true question before the Court was, Had there been a declaration of trust? Equity has a simpler answer to that question than any that can be made to that modern query in simple contracts, Where is the offer and the acceptance?

In the Court of Appeal, Greene, M.R., rightly held that *prima facie* a trust had been constituted but refused the declaration that there had been a breach of trust on a purely equitable ground. He relied on a dictum of Jessel, M.R., in *Luke* v. *South Kensington Hotel Co.* (11 Ch.D. 121, 125): "It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties, the deed does not bind in equity if the third refuses to execute." The most common instance of this equity is the case (such as *Evans* v. *Bremridge* (1856), 8 De G.M. & G. 100) where only one of two co-sureties named in the deed in fact executes the deed, and it is sought to enforce the deed against the one who did execute. As stated by Sir George Jessel, the principle was held by the House of Lords to be too broad and general, though its precise limits are difficult to ascertain. It puzzled Lord Wright: "That there is some principle in equity I do not doubt, however reluctant as a common lawyer I may be to weaken the legal effect of the solemn undertaking involved in a conveyance or covenant under seal" (p. 509). He thought the word "faith" was not very happy though he was on safe ground in saying that it was not used in a theological sense. But Sir George Jessel was not guilty of initiating the use of this vague term to explain the principle. It is to be found, for example, in the judgments of Turner, L.J., in *Re Dover etc., Ry. Co.* ((1855), 7 De G.M. & G. 43, 52) and *Evans* v. *Bremridge* (*op. cit.*, p. 109). In some cases the word "assumption" or "understanding" has been used in this context. More than mere intention or expectation in the settlor's mind is meant.

After *Naas* v. *Westminster Bank Ltd.*, the equity can be taken to have a narrower definition. Lord Russell of Killowen did not think that "the proposition can be carried further than saying that the equity arises where a deed is sought to be enforced against an executing party, and, owing to the non-execution by another person named as a party to the deed, the obligation which is sought to be enforced is a different obligation from the obligation which would have been enforceable if the non-executing person had in fact executed the deed" (p. 500). As so defined it had no application to the facts of the case; there is no instance of any such equity against a non-executing party who seeks to enforce benefits conferred upon him by the deed: there is no foundation on which the equity could rest, for by his action he is affirming and adopting the provisions of the deed, and he is bound by it as effectually as if he had executed it. Even as thus limited, however, this neglected equity would seem to have powers of unexpected development.

W. H. D. WIN

REVIEWS

THE LAW OF THE CONSTITUTION. By A. V. DICEY, K.C., Hon. D.C.L. Ninth Edition, by E. C. S. WADE, M.A., LL.D. 156 and 681 pp. Macmillan & Co. **15s.** net.

Generally speaking, it is undesirable for an editor to produce a new edition of a book so impregnated with the author's personality as Dicey's *Law of the Constitution*. An ardent disciple could, perhaps, touch up the text here and there so as to make it appear a little less antediluvian; but it is doubtful if any modern lawyer could continue on Dicey's lines without reservations. The *Law of the Constitution*, too, was not only intensely personal; it was in addition a *pièce de circonstance*, as evidently a justification of the Whig view of the Constitution as Locke's two treatises. The long Introduction to the eighth edition was even more of a political tract. It expressed the views of an old Whig who now found himself in the Unionist Party because of Mr. Gladstone's attitude to Home Rule. It expounded Unionist views on women's suffrage, proportional representation, Home Rule, and the referendum. The whole book is written with academic detachment. It was not intended to sway votes at the election of 1886 or even at the election which would have been held in 1915 if there had been no war. It had none of the casuistic argument of Dicey's polemical contributions to the Home Rule Debate, such as *England's Case against Home Rule* (1886) or *A Fool's Paradise* (1913). It did not say, for instance, that Parliament would remain sovereign until Mr. Asquith put sovereignty into a Home Rule Bill, when it would not be sovereignty at all. Nor did it assert that the Rule of Law permitted a Unionist to follow Sir Edward Carson in taking the Covenant to resist by all necessary means the application of the Government of Ireland Bill, when enacted, to Ulster. It consisted of lectures delivered by the Vinerian Professor and not of political speeches delivered by the orator who went the round of the country houses in order to speak to the lower orders about the iniquities of Mr. Lloyd George. It was, nevertheless, not an analysis of the Constitution as it stood but an analysis of the Constitution as it appeared to a Whig who, a few months later, became a Liberal Unionist.

There are now no Unionists except in Ulster, and it is doubtful if anybody knows what Dr. Wade's views on Home Rule are. *Laissez-faire* is now urged by few—probably by none outside the London School of Economics. We know all about the social services, including those in existence in 1885 which Dicey ignored. Constitutional lawyers to-day read statutes, as evidently Dicey rarely did—the chapter on Public Meeting may be good liberalism, but it was bad law even in 1885 because Dicey had not looked at the statutes. Is it possible, then, for a new edition to be produced? When Dr. Wade first mentioned to me that he had undertaken the task, I thought that he had made a mistake. Reflection suggested, however, that though Dicey's book was impregnated with the ideas of a section of opinion in his own day, the simplicity of the style, the flattery of the Englishman's self-esteem implicit in the comparisons with the constitutions of lesser breeds, and above all the fact that the Whigs created a tradition in lists of books recommended, have established the notion that Dicey expounding the Constitution as it existed and still exists, and not

the Constitution as he desired it to be. It is therefore desirable that, while the text of the body of the book should stand, there should be some explanation of the criticisms which have been made against it, and some reference to the remarkable omissions.

Dr. Wade has, I think, performed a delicate task extremely well. He has obviously been much oppressed by lack of space, but he has been very fair in his statement of the criticisms. The fact that he gives his own support to those criticisms suggests that the accusation that they are based upon a view of the Constitution no less partial than that of Dicey's is not firmly based. It is, of course, true that every constitutional lawyer is affected by his bias. I have noticed on my own part a tendency to forget the Church of England, though I never forget the Nonconformist Conscience. But the criticism of Dicey is not that his politics were wrong but that his Constitution did not exist. It is not that the Rule of Law is undesirable, but that it was not correct analysis of the British Constitution of 1885 and has become even more incorrect since. I can affirm as a fact that my own criticisms of Dicey, published in the first edition of *The Law and the Constitution* in 1933, had not their origin in political opinions. My first lectures on constitutional law were based essentially on Dicey and Anson. My independent research was directed primarily to constitutional conventions; and my first criticisms of Dicey related to his treatment of those conventions. I had also investigated parts of the law relating to proceedings against the Crown, but without realising that the special rules were quite inconsistent with the Rule of Law. My criticism of the Rule of Law began with his contrast with *droit administratif*. After some five years my conscience smote me that I was following an amiable but lazy tradition by lecturing on French administrative law without having read a single book on the subject. A glance at Hauriou and some digging into Jèze showed that I had been talking complete nonsense. After that the Dicey structure began to tumble down; but the finding of political reasons for Dicey's errors came after the discovery of the errors themselves. Perhaps the explanation of Dicey's psychology has retarded the acceptance of the criticisms; but the error was an honest one—I wanted not only to explain that Dicey was wrong but also why such an intelligent person went wrong.

The production of Dr. Wade's edition impelled me to read Dicey himself once more, probably for the sixth or seventh time. I was astonished to find that I was bored. My recollection was of a rather long-winded book which contained much pregnant observation in addition to the general argument. Perhaps the incidental remarks have become so much a part of our heritage that they are no longer worth saying; yet Bagehot's quips have become commonplaces without ceasing to instruct and amuse. Perhaps, also, a constitutional lawyer who has been thinking of these things for many years is no judge of a book written fifty years ago for the student and the layman; yet Bagehot wrote about things to which I have paid even deeper attention, and his book is made up of review articles. No doubt the academic style, the repetition of the argument to make certain that it is clear, the slowness of the development to make sure that the uninstructed reader is following, were more suited to the deliberation of the Victorian age than to the speed of to-day. I suspect, however, that the Whig Bagehot wrote a classic, whereas the Whig Dicey wrote a book of profound historical influence which need no longer be read.

THE DILEMMA OF PENAL REFORM. By HERMANN MANNHEIM. pp. 238 (with Index). London: George Allen & Unwin. **7s. 6d.** net.

Criminology may properly be regarded as a branch of sociology, which is the cinderella of the sciences. Curiously enough, however, criminology was seriously studied as a science long before sociology, and in the work of Lombroso a standard was set for later workers which is far from having been generally maintained. The great difficulty in the social sciences, and perhaps most of all in sociology, is the difficulty of applying the empirical method which has proved so valuable in the pure sciences. Sociologists are naturally better aware of this than most of those who attack them on this score, and have attempted to deal with the problem by means of field work, for which there has always been a paucity of skilled observers, and by the elaborations of statistical methods; alas, here, too, only a minute fraction of the very small army of competent statisticians has been obtainable. In the result progress has been slow.

There is no branch of sociology which is so susceptible to the use of the experimental method as criminology, and especially the dominant section of it, penology. The prison population is under fairly close control, and the number of recidivists being a high proportion of the whole is under control for long periods. To make proper use of this unique opportunity, which would surely yield material of value beyond the immediate confines of this field of study, would, however, require highly trained scientists among those in control of prison administration, and among the administrators themselves. Although of recent years there have been signs of a movement in this direction we have been too often fobbed off with goodwill, which certainly does not provide more than a groundwork for action. In the result criminology has had very largely to rest on subjective analysis supported by field statistical work whereby its fruits have been as small and unripe as those which have grown upon the other branches of the tree of sociology, and this even in the U.S.A. and other countries where much money has been spent on manures.

In England there has been a deplorable lack of support for the scientific study of this subject, an apathy which may be regarded as extraordinary considering the enormous loss to the community, both material and moral, which criminality involves. Such work as has been done, and it has occasionally been of a high order, has been that of interested individuals, more particularly of medical men in the service of the Prison Commissioners. We need only refer to the investigations of Dr. Gore which radically affected certain theories of Lombroso relating to hereditary criminality. The result is that criminology has made less progress here as a science than in any other of the leading countries. At the same time penal reform has made considerable headway under a series of enlightened commissioners of prisons. If, therefore, a scientific training could be provided for and insisted on in the prison administration, the way would be open for an immediate advance of a character not previously experienced, both in the working of the penal system and in the development of criminology.

Of this there has been certain signs in the sky. The most significant of these is the provision of proper training for probation officers and others engaged in prison administration under the aegis of the Home Office, and the inauguration of regular university teaching in the subject in the University of London, at the London School of Economics under Dr.

herald the opening of a new era, it is sincerely to be hoped so, and mark the beginning of that scientific training for penal administrators which we have insisted is necessary before a really satisfactory criminology can be built up. Dr. Mannheim has two advantages for his present task. He is a distinguished criminal lawyer, and criminology has suffered much in the past through being regarded by lawyers, who are apt to have the last word, as a subject for cranks. He has also been for many years a judge in criminal courts, which makes him the less exposed to the danger of a purely theoretical disquisition, and this in the absence of facilities for experimental verification has too often characterised the work of sociologists.

These qualities are notable in the present volume, which is in substance a course of public lectures given at the London School of Economics in 1939. Although the author is naturally concerned with presenting to an inexpert public the main elements of an exceedingly troublesome problem, and never therefore moves far from well-explored territory, his work is informed by an alert, liberal and inquiring intelligence which gives it much of the value of originality. Moreover, he covers the ground with such care, without losing himself in unnecessary detail, that the book forms a real conspectus of the subject, and will be invaluable as an introductory survey for all students newly approaching the study of criminology. Indeed, from this point of view it is something for which we have long been waiting in this country; the rather more comprehensive work of Dr. Bonger undertaken in a foreign milieu having the defects of its origin.

After an introduction of profound interest in which he discusses such matters as the ethical basis of criminal law, and the effect of changing conceptions of social values upon criminality, Dr. Mannheim proceeds to his first chapter in which he examines the rôle of the economic factor in penal history. Under the pervasive influence of Marx the history of everything is apt nowadays to be seen through economic spectacles, and there can be no doubt as to the importance of this factor in the evolution of modern forms of punishment. As elsewhere, however, it is not the sole, or even perhaps the dominating force, and Dr. Mannheim, while according it due influence, finds that, especially in the most recent era, moral factors have played an increasingly important part.

One of the most important economic factors making against penal reform has been the principle of less eligibility, which postulates that the lot of the prisoner must always be made more hard than that of the worst-off honest man outside. This doctrine, which makes an instantaneous psychological appeal to the man in the street, has always been, and still is, a stumbling block. It is handled by Dr. Mannheim with a critical intelligence, and yet with understanding sympathy.

The following chapters are concerned with the social dilemma, where again the less eligibility principle furnishes a peg on which to hang some acute constructive criticism. Here Dr. Mannheim is naturally much concerned with the question of stigma, which has become of increasing importance in modern times. Against this background he discusses probation and the Borstal system.

In the final chapters the legal problem is dealt with, more particularly in connection with procedural machinery, the importance of which has not always been recognised. Here we learn particularly about the Juvenile Court and its problems, and about the proposals for diversion

of a prisoner from the sentencing by means of Treatment Tribunals. In a thoughtful concluding chapter Dr. Mannheim introduces us to some possible future trends of penal reform. These have been foreshadowed in the earlier descriptive parts of the volume, and are largely concerned with methods of rehabilitating the criminal as a citizen, more especially from the point of view of removing the stigma of criminality.

R. S. T. CHORLEY.

MR. JUSTICE HOLMES AND THE CONSTITUTION. By FELIX FRANKFURTER. 139 pp. London: Oxford University Press (Agent for Harvard University Press), **8s. 6d.**

This little book has an importance out of all proportion to its size. Mr. Justice Holmes, as is well known, was the outstanding figure in the Supreme Court of the United States during the last generation; and it is possible that, with the single exception of John Marshall, he is the most important figure in the whole history of the Court. As a legal historian, he belongs to that small class of men among whom Maitland is the chief name. As a jurist, he has done more to set the boundaries of legal thinking than any name in the Common Law since Austin.

This essay on him, by one who has now succeeded to the seat on the Bench which Mr. Justice Holmes occupied, is written with an insight into Holmes's work which is unequalled by any other living writer. It has a profound interest for anyone interested in the processes of law as such. For though, formally, it is a study of the canons of interpretation which Mr. Justice Holmes brought to the problems of the American Constitution, its argument touches the far wider issue of the function of the judge in a democratic society. It gains added interest from the fact that Mr. Justice Frankfurter writes as one who eagerly accepts the great tradition of method which his predecessor bequeathed to us. His portrait of Mr. Justice Holmes at work is, as it were, an essay that may well be prophetic of the manner in which the Supreme Court will approach its problems during the next twenty years.

Mr. Justice Holmes embodied as no other man in modern times the liberal tradition in American jurisprudence. That is in itself significant, since his own private philosophy was, at bottom, profoundly aristocratic and conservative. He reached his standpoint from the realisation that there are no absolutes in law, that what we call "fundamental" doctrine is no more than a body of principles to which long use has accustomed us, that these have been adapted before, and may have to be adapted again, to new needs. He did not, therefore, conceive it part of his function as a judge to assist in making the Supreme Court a third and decisive chamber of the legislature. He took the view that as long as schemes of social change did not directly violate the plain letter of the Constitution, it was not his business to rule against them because he thought them unwise or even foolish. His test of validity was whether, granted the proper observance of the procedures laid down by the Constitution, a reasonable man could find reasonable evidence for the point of view the legislation upheld; if he could, Mr. Justice Holmes was not prepared to substitute his private view for legislative enactment. At the same time, he was emphatic that the procedures which guaranteed the classic civil freedoms to the citizen must be safeguarded from invasion or evasion by prejudice or passion, or

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techniques so gravely capable of wanton abuse. Anyone who looks at his famous opinions in *Noble State Bank* v. *Haskell* or *Abrams* v. *U.S.* will see at once the temper in which he approached his task.

Mr. Justice Frankfurter has admirably and amply illustrated that temper in the main theatres of American constitutional activity. The implications of his argument reach far beyond the American scene. They are applicable, not merely to the work of the Judicial Committee in Australian and Canadian cases; they are applicable also to much of the High Court's work in this country in the field of statutory construction. We realise too little the degree to which English judges have evolved techniques of statutory interpretation the result of which, in sober fact, is to erect barriers in the way of legislation they happen to dislike. We have far more judicial review in this country than we like to suppose, and not a little of it is the outcome of using the supposed "principles" of the Common Law as a way of defending conceptions upon the undesirability of which Parliament has made up its mind. "The Fourteenth Amendment," wrote Mr. Justice Holmes, "does not enact Mr. Herbert Spencer's *Social Statics*." But some of our judges deliver themselves of opinions which would not be easily intelligible except upon the assumption that the principles of Mr. Spencer's political philosophy are a canon to which Acts of Parliament in general, and delegated legislation in particular, must conform. They exercise a post-natal power of limiting the expressed will of Parliament in a way which does not substantially differ from that of the Supreme Court at its worst. Against that attitude, Mr. Justice Holmes's half-century on the Bench was a massive and noble protest. We are grateful to Mr. Justice Frankfurter for an exposition of his doctrine which is notable alike for its clarity and insight.

HAROLD J. LASKI.

POLLOCK'S LAW OF TORTS. Fourteenth Edition. By P. A. LANDON, M.A., M.C., *of the Inner Temple, Barrister-at-Law; Fellow and Tutor, Trinity College, Oxford; University Lecturer in Law; Lecturer to the Law Society, London.* Messrs. Stevens & Sons, Ltd. 1939. xlvi and 504 pp. **25s.**

It is an entirely pleasurable task to welcome the publication and to review the contents of this new edition of Pollock's masterpiece, and, at the same time, to congratulate Mr. Landon on the general excellence of his editorial performance and on his appointment to a Readership in the University of Oxford. What he felicitously describes as Pollock's "skill in constructing out of the huge quarry in which he mined a work which remains and will remain a model to all writers of text-books" was exhibited to a greater degree of perfection in this work than it was, for instance, in the *Law of Contract*, in which Pollock allowed his subject to take him on some pleasant but disconcertingly deviating rides. Although *The Law of Torts*, to those accustomed to the arrangements of more modern text-books, presents some strange features in its "plotte-forme" (an Elizabethan compound of merit), as, for example, in its treatment of *Rylands* v. *Fletcher* and cases of negligence under the one heading, and its brief discussion of liability for breach of statutory duty in the chapter on remedies, it is, nevertheless, a work which can confidently be recommended to the master and the apprentice alike. Mr. Landon's work on it adds to its merits of interest, lucidity, and succinctness. In fact, parts of the [redacted]

blues" or post-influenza depression. Its full-bloodedness cannot fail to have a tonic effect on the most jaded system.

Mr. Landon's work falls mainly into three parts: 1. The inclusion of notes and comments made by Pollock before his death; 2. The usual task of noting recent material; 3. The presentation in four excursuses and in many footnotes of Mr. Landon's own views. The latter not infrequently differ, in varying degrees, from those held by Pollock.

1. The established views of Pollock are too well known to require discussion in a review of a fourteenth edition. New matter from his pen is inserted at about thirty points, but attention need only be drawn to some of them. In view of Mr. Landon's criticism of *The Snail Case*, it was wise to reprint Pollock's note on it from *L.Q.R.*, Vol. 49. The comment on *Flint* v. *Lovell*, reprinted from the same journal (Vol. 51), showed prescience, but was not remarkably lucid or exhaustive. Pollock's summary of the effects of the "rescue cases" (see p. 129) required emendation by Mr. Landon. Recent decisions add to the value of the note on p. 201, also reproduced from the *L.Q.R.* (Vol. 46), on *Cassidy* v. *Daily Mirror*, and it is of interest to observe that Pollock was prepared to acquiesce in the view there taken by Russell, L.J., of the principle of *Hulton* v. *Jones*. Other notable points emerging from this edition are that Pollock agreed with the majority view in *Osborn* v. *Poulter* that the dictation of written words to a clerk may be slander, but not libel, that he doubted whether *Macintosh* v. *Dun* was consistent with the modern case of *Watts* v. *Longsdon*, that he apparently felt some hesitation about *Wilchick* v. *Marks*, and that he tended to agree with Professor Plucknett's views on the *in consimili casu* provisions of the Statute of Westminster.

2. Mr. Landon's declared policy in the matter of noting recent decisions was to follow Pollock's principle of selecting rather than collecting cases, but he admits to being more lavish in referring to cases decided from 1936 onwards to March, 1939.

Pollock could be curiously eclectic in his selection of material which he deemed worthy of reference in his footnotes. Mr. Landon is to be congratulated on filling some of the more obvious lacunae in previous editions and warmly commended for keeping the new material within very strict limits. But it may be permissible to suggest that parts of the text are extremely cursory in proportion to their practical importance to-day or in the near future. Breaches of statutory duty and contribution between tortfeasors are two examples which spring to mind. Some of the recent cases merely named in the footnotes might well carry some brief comments with them, particularly *Shirvell* v. *Hackwood Estates*. Occasionally, the very brevity of a note raises a doubt as to its import, as on p. 41, where the reference to the Court of Appeal and damages for loss of expectation of life may either be taken as a record of fact or as a criticism, and on p. 405 students may well be misled by note (*y*) into thinking that *Longmeid* v. *Holliday* cannot be reconciled with *The Snail Case*.

The "technical" side of the editing has been very well done. There are very occasional lapses in proofreading, the w[illegible]36, where *Rickards* v. *Lothian* appears as a 1931 case[illegible] sentences in the text, the first on p. 65, where the [illegible] e slipped in instead of "owner's" (?); and [illegible] e bottom of p. 320.

The real interest of this edition lies in [illegible]

learned Hamlet can never be a merely passive spectator of the rottenness of a Denmark whose pristine state of glory and strength is being undermined in an age of decadence. He does not hesitate to indicate where the decay appears, who the decadents are, or how to arrest the baneful decline. Although he does not always carry argument to conviction on all or any of these matters, we trust that there is none to deny that his presence amongst us is, in the language of *1066 and All That*, "very definitely a good thing." If we may say so, without offence intended to Mr. Landon or to the classes herein specified, he is a very useful corrective against (i) Sob-sisters, Yammer-Heads, and/or Softies; (ii) Revolutionaries; (iii) Yankees. Of whom, more hereafter.

His four excursuses are devoted to (i) a powerful attack on the Pollock view of the general principle underlying the law of torts; (ii) a very able and partially convincing plea for the reversal of the decision in *Stanley* v. *Powell*; (iii) a very definite pronouncement in favour of the Dunedin theory of the tort of conspiracy; and (iv) an expression of distrust of *The Snail Case*, its ancestry and its progeny, actual and prospective. The third is the least meritorious, albeit the least combative. There is a great deal to be said for the Dunedin theory, but students should be made more aware of the difficulties of basing a tortious liability on a criminal liability the extent of which has been disconcertingly vague and flexible, and which, in modern times, has been much affected by legislation relating to the very class of cases in which the question of tortious liability has most frequently arisen. There is also the question of what rule to adopt in cases of mixed motives, which are likely to be the normal cases. Mr. Landon's fourth excursus is extremely interesting, but smacks a little too much of special pleading, and its strength is weakened by some uncertainty as to the exact objective of the attack. If it is to stress that Lord Atkin's wider proposition must be applied with considerable care, particularly in view of some well-established lines of cases in conflict with it, surely there is some danger of wasting energy in pushing a battering-ram at an open gate. Similarly with repetitions of the statement that the case falls within the confines of the tort of negligence. If the object of the statements that the *ratio decidendi* of the case is limited to (i) manufacturers, and (ii) products which are sold, is to limit the application of the principle to such cases, Mr. Landon is in danger of knocking his head against a brick wall. Some of the cases which he quotes and later cases constitute the wall.

[After the recent spate of articles on the subject, little purpose would be served in re-stating the arguments against the Pollock-Winfield theory of a general principle underlying the law of torts, but one *caveat* appears to be necessary, and that is that critics of Dr. Winfield should go more to the original article in the *Columbia L.R.* and less to the *Text-book*. The very considerable qualifications which Dr. Winfield specified as imposed on the freedom of judicial legislation are apt occasionally to be overlooked by *some* of his critics.]

Easil[illegible]ontribution which Mr. Landon has made to this edi-[illegible]rsus, in which he submits the decision in *Stanley* v. [illegible]ticism. He may not have done complete justice to [illegible] might be quoted in favour of the view that [illegible]ence in trespass, but he is on a solid ground [illegible]n contribution to the discussion, the ass[illegible]

by Bramwell in *Holmes* v. *Mather*, is a good one. But when he proceeds to argue that the strict liability principle is the better one as a matter of social principle, he does not carry quite the same degree of conviction. His main argument on this head must be reserved for special comment. But it may be permissible to express the wish to meet the progeny of the plaintiff beater in *Stanley* v. *Powell*, who, according to Mr. Landon, would have lost his case anyhow on the ground of agreement to run the risk of being accidentally shot!

There is no need to say that Mr. Landon does not spare his "enemies" and his declamations are enjoyably classical. In the front rank of the hosts of Beelzebub may be placed (i) Denman, J., the evil but not the genius behind *Stanley* v. *Powell*, one of two judges who "inherited their positions on the Bench *per stirpes* and not *per capita*," "an undistinguished puisne judge," who, apparently, had one lucid interval when Esher, M.R. (*q.v. infra*) illuminated his mind in *Ellis* v. *Loftus Iron Co.*; and (ii), "academic writers who theorise" (*cx.* "common-sense" on p. 141), who delight in "law as taught in the professor's study" as contrasted with "law as administered in the courts" (p. 47). In the second rank come the authors of the heresies of "proximity" and "who is my neighbour?" Esher, M.R., and Lord Atkin. Then comes Pollock himself, who is much praised and who, to his eternal credit, (i) was not a juristic speculator, (ii) lauded "that classical period of our jurisprudence which in England came between the Common Law Procedure Act and the Judicature Act"; and (iii) always emphasised "the experience of just men of past generations, as against the fluid and ephemeral morality and sociology which, in some circles, especially in America, are nowadays set up as the sole objective of modern law". But he had strains of original sin in him, for he (i) stuck stubbornly to the general theory principle; (ii) loved too much the fault theory; (iii) showed too much *pietas* towards his errant grandfather; (iv) used the wicked device of calling what he did not like "stubborn archaisms"; and (v) had a nasty habit of not changing his darkness for light. We must also note that the Vinerian Professor has blotted his copybook by accepting *Stanley* v. *Powell*, but it is fair to note that this is a case of

> "I would not love thee, Dear, so much,
> Loved I not Tidd and Chitty more."

Then, not without honour even in "enemy territory," lurks Dr. Winfield, who somehow emerges from "the furnace made seven times hotter," wearing an air of respectability, though his *Province of the Law of Tort* does not appear in the footnotes to the chapter on "Special Relations of Contract and Tort." Then, of course, there are the revolutionaries, who do not merit inclusion in inverted commas, an honour reserved for "us 'extremists'" (*cx.* pp. 44 and 140). The footnote attached to the revolutionaries reads: "See Gutteridge, Abuse of Rights, 5 Camb. L.J., 22 *passim*." We trust that this note is sufficiently explicit to absolve the genial Professor of Comparative Law from the suspicion of having hoisted the Red Flag himself! Finally, there are our American cousins, with their "fluid and ephemeral morality and sociology," whom Thomas Beven (bless his stout heart) flogged for accepting principles "novel but fundamentally unsound" (p. 385), and who have achieved the supreme disgrace of producing "the subversive American, Street"

All this is grand stuff, though to some weaklings born and bred in this mealy-mouthed generation it may be too strong.

But your reviewer suffers under the misfortune of being the sole survivor of that miscreant race called "life-long Liberals." His miserably lonely existence has recently been rendered still more intolerable by witnessing the fusion of extremes in Europe, the amalgamation of "us extremists" with revolutionaries. It may be the unhinging of his mind by this calamity which causes him to suspect that that may soon be the end of Mr. Landon's pilgrim's progress. Is there not a real danger that our worthy nationalist may soon add socialism to his creed and fuse with the revolutionaries? Consider his case. His main argument for the reversal of *Stanley* v. *Powell* is: "The defendant need not have acted at all; if he chooses to act, and if his act inflicts injury directly upon his neighbour, why should the injured party go without remedy?" But, Mr. Landon, where is this revolutionary socialistic doctrine logically to stop? Witness the effect of its acceptance already upon him! To support it he quotes a most subversive assertion by Dr. Hanbury that the defendant in *Stanley* v. *Powell* ought to compensate the plaintiff as the "circumstances were such that his propinquity could have been contemplated." Mr. Landon is too good a logician to fail to observe, and too good a special pleader to ignore, the similarity between "propinquity" and the heresy of "proximity," but proclaims that the Mannerheim Line of his faith is "the solid rock of the (old) common law." But we tremble lest his belief in this medieval communism stuff will sooner or later undermine his faith. He has already sacrificed tortious lunatics and infants. He is prepared to abandon the defence of non-negligent unfortunate golfers against the injured chauffeurs of plutocrats driving past the links (p. 141). (His tinge of socialistic propaganda is disclosed by the fact that he does not make the defendant into an artisan-golfer, but plays on our sentiments by placing the chauffeur and not the plutocrat at the wheel of the car!) At this rate, it will not be long before his guns cease to harry *The Snail Case* tanks and we active ones will be the social insurers of the snails of the community. If liability for direct injury, why not indirect? If liability on the highway, why not off the highway, and then in private places? Witness further his decline into attacks on the most altruistic friends of society when, in defending *Cavalier* v. *Pope*, he tries to expose the anti-social proclivities of our landlords, who, he says, "would never undertake the obligation to repair if by so doing they rendered themselves liable to the whole world for the results of a breach of contract" (p. 411).

But Mr. Landon has but scotched, not killed, our faith in him; he still has a *locus pœnitentiae*. On p. 145, he roundly declares that "the inviolability of person and property is a precious thing in these days," and is prepared to see it protected, at any rate to the extent of keeping inviolable the property of insurance companies and/or active motorists who violate unto death the persons of too immobile pedestrians. For on p. 54 he very rightly declares that "this anomaly" (which is either the Law Reform Act, 1934, or the decision in *Rose* v. *Ford*) "should be removed by the Legislature which imposed it upon us." And he is still a comfort to us, *laisser-faire* individuals who wish to preserve the right to be malicious by abstracting water from our lands and frightening our neighbour's vixen into barrenness. And we private cable companies may still wrongly transmit cables and derive comfort from the thought that, despite *The Snail Case*, *The Reuter Case* is still good law.

still breathe as hot and cold as our forefathers did, those "just men of *past* generations."

In these days of ephemeral sociology and morality, we are too prone to read the text "For there were great men in those days" with an intonation of surprise. We "life-long Liberals," whose cloud of witnesses hangs over the distant side of Jordan, can derive some comfort from the thought that there are still one or two alive who read the text with the right emphasis on the word "those."

Polemics apart, we express our sincere gratitude to Mr. Landon for his careful editing and his stimulating contributions.

D. R. S. DAVIS.

THE LEGAL ASPECT OF MONEY. By F. A MANN, LL.D., Dr. Jur. pp. xxv and 334. 1938. Oxford University Press. **21s.** net.

Money is the greatest problem in the lives of most of us, and it stands for those economic forces which mankind has not hitherto been able to control and which have brought him to the verge of moral and material ruin. As an economic institution money has always been the subject of intensive study by economists who are to this day divided in their theories over certain fundamental aspects of the problem, as the controversies, not yet died down, which followed the publication of the well-known work on the subject by Keynes a few years ago amply demonstrate. And yet lawyers have remained profoundly oblivious of the inherent difficulties of money from the point of view of their own science right down to our own generation. This book is the first on the subject of any serious moment ever to be published in English,[1] while even on the Continent there have been few studies of the subject and those all of recent date. Dr. Mann pertinently asks in his preface what is the reason for this extraordinary state of affairs. He is not concerned to answer it at any length, though no doubt he puts his finger on the crucial point when he says that it is due to the long period of stable equilibrium in economic matters which characterised the great trading and industrial states down to the beginning of the Great War, 1914–18. Within the confines of a state money gives rise to comparatively few legal problems and those for the most part not of great inherent difficulty, always of course excepting the contractual mercantile currency which exists in the form of negotiable instruments. This is because the value of money in modern times remains stable within the confines of the state. And it is just because this has of recent years not been true internationally that the inherent problems of the subject have come to light, and the courts of all countries have been faced with such extraordinarily difficult tasks as the measurement of damages in connection with the breach abroad of legal obligations, and the construction and application of what are called gold clauses. These are among the more important topics discussed by Dr. Mann in the present volume.

There can be no doubt of the great value of his contribution to legal science. Degree theses are often of very little account—this which earned the doctorate of the University of London proves that the thesis system is capable of producing real fruit. This book is comprehensive, accurate,

[1] It has now been succeeded, though certainly not supplanted, by the work of Prof. Nussbaum, *Money in the Law*, reviewed in 3 Mod. L. Rev., p. 247. The present review has been held up owing to the absence abroad of the original

and illuminating. With no earlier literature to guide him the author has nevertheless succeeded in opening up a discussion upon every aspect of a subject which is intermingled with many branches of the law. From what has been said above it might be supposed that these discussions must be largely theoretical. This is not so, for while it is true that until the post-war period there are comparatively few English cases, recent years have yielded a harvest which is extensive if not always of high quality. Moreover these problems are naturally not peculiar to England, and the solutions proposed for them on the Continent and in the U.S.A. may at the least furnish our own courts with suggestions. There is perhaps no aspect of mercantile law, unless it be that of international transport, where it is more important to have a fairly uniform set of rules. Moreover, until very recently there was no *damnosa hereditas* of precedent to prevent such a uniformity from being achieved. Even now the divergencies are in many respects not serious. In these circumstances Dr. Mann's intimate knowledge and copious use of the Continental and U.S. decisions is of much more than academic value. His book, should it have the good fortune to come into the hands of the legal profession both among the bar and in the judiciary, may well help to mould our law in the desired direction.

We will now endeavour to indicate the principal topics dealt with by Dr. Mann in his volume. In the earlier chapters Dr. Mann is much occupied with the fundamental economic aspects of money. He gives a lucid and searching analysis of these, the soundness of which we are hardly competent to judge. This is certainly a necessary background for the main discussions of the book and one which we found most helpful, though the average lawyer may well think it somewhat over-elaborated. Nevertheless, even this part of the book never degenerates into theoretical economics, for the author maintains contact with the legal aspects of the situation throughout.

This part is succeeded, or indeed intermingled, with an analysis of the general legal problems to which money gives rise. The organisation and incidents of the monetary system, monetary obligations, their subject-matter and extent, are discussed in this part of the book. The vital problem of the meaning of the phrase "payment of a sum of money" brings Dr. Mann to the subject of nominalism, and it is here that economic theory is particularly to the fore. It was declared as recently as 1927 by the Berlin Court of Appeal that "capitalism is economically inconceivable," except on the basis of nominalism, and it is certainly the only theory which lends itself to legal administration. Nevertheless, it works hardship at times when currencies are debased, whether by the old-fashioned methods of decreasing the value of the metallic content of coinage, or by the modern method of inflation. This gives rise to theoretical proposals for combating the trouble, and, much more important from the lawyer's point of view, to practical expedients for protecting lenders. It is at this stage that we come up against the gold clause, and here of course we are primarily concerned with problems which are international in character, though on the authority of *Feist's Case*, [1934] A.C. 61, it would not appear that there is any objection to the insertion of a gold clause in a contract of internal loan.

The second, and from the practical point of view, more valuable part of the volume is therefore concerned with foreign money obligations. Here Dr. Mann starts by clearing the ground by an analysis of the position

of foreign money and foreign money obligations in English law. He then passes to "the determination of the money of account," which is the crux of the whole problem. Here we have an able discussion of *Adelaide Electric Supply Co.* v. *Prudential Assurance Coy.*, [1934] A.C. 122, which Dr. Mann properly singles out as being the leading authority on this extraordinarily important topic. This brings us back to a further consideration of the nominalistic principle, and to the problem of judgment for damages and for debt when a municipal court is adjudicating upon an obligation incurred abroad. We are here faced with the difficult questions which arise in connection with the payment of foreign money obligations (Chapter VIII) and then with the institution of legal proceedings and its effect upon foreign money obligations.

Many of the problems which arise in this part of the book are naturally in the domain of private international law, and there can be no doubt of the great value of Dr. Mann's contribution to this branch of the law. Not since the appearance of Dr. Cheshire's textbook has there been anything of equal importance, and it may be safely said that this book will become an essential volume in the library of all students of this subject.

In a series of appendices Dr. Mann gives reports of several important decisions which for some reason have not found their way into the reports.

R. S. T. CHORLEY.

THE SOLICITORS' HANDBOOK OF WAR LEGISLATION. By S. M. KRUSIN and P. H. THOROLD ROGERS. lx and 836 pp. London: Sweet & Maxwell, Ltd., Stevens & Sons, Ltd., and The Solicitors' Law Stationery Society, Ltd. **30s.**

The authors describe their object as being "to provide, in a single volume of moderate size, a comprehensive and practical survey of the War Legislation of 1939 so far as it concerns the legal practitioner." They have interpreted "legislation" to include statutes, regulations and rules and orders, and they have grouped it in nine parts, under nine titles, namely, the Courts and Litigation, Property, Wills and Trusts, Finance, Commerce, National Service, Social Services, Emergency Powers, and Compensation. Each part opens with a list of the legislation dealt with in that part. There follows a "preliminary note" briefly summarising the effect of that legislation and in most cases containing a general discussion of its underlying principles. Then the text of statutes is set out and annotated. Finally the relevant regulations and rules and orders are set out and occasional explanatory notes accompany them. There are two Appendices, Tables of Cases and Statutes and a good Index. The Preface contains a statement of the authors' intention to bring out supplements as further War Legislation is issued—an intention which has already been in part carried out.

Considerations of space do not allow attention to be drawn to more than two features of this work. The first is the annotations. These are very helpful so far as they go. They cite decisions on similar enactments passed during the war of 1914–18 and they bring out certain differences between the current war legislation and that of the last war. In some cases the notes are in every way adequate—full, well-considered and critical. In other cases they are inclined to be brief and very general. It is the second feature of the work that will commend itself particularly to academic law-

Notes." These notes are in some cases historical, in some instances they contain a critical analysis of the statutory provisions and a general comparison with the legislation of the last war. They can be warmly commended.

The book is excellently printed and produced and having regard to its size and the mass of material which it contains its price seems very reasonable.

D. HUGHES PARRY.

THE PRACTICE OF THE DIVORCE DIVISION. By E. A. PHILLIPS. Third Edition. London: The Solicitors' Law Stationery Society, Ltd. 1939. xlviii and 622 pp. **42s. 6d.** net.

The last edition of this work was published shortly after the Matrimonial Causes Act, 1937, came into operation, but so many points in that statute have been elucidated since then by the Courts that a new edition, embodying the results of these recent cases, was necessary. It is most unusual to have within the covers of a single book all the law and practice on a subject, but Mr. Phillips has managed to do that for divorce. Perhaps the best indication of the completeness of his book is the fact that over one-third of it is made up of appendices which give the full text of the various statutes dealing with matrimonial affairs, the Matrimonial Causes Rules, the relevant Rules of the Supreme Court, and finally a most exhaustive list of precedents, some 155 in number. A copious index enhances the usefulness of the work. Like most members of the profession, the learned author preferred the decision of the Divisional Court in *Stafford* v. *Kidd*, [1937] 1 K.B. 395 to that of Luxmoore, J., in *Re Bromage*, [1935] Ch. 605, and presumably shares the hope that the House of Lords will reverse the Court of Appeal which has overruled the former decision in *Ettenfield* v. *Ettenfield*, [1940] 1 All E.R. 293. This book is very accurate and will receive a warm welcome from lawyers who handle divorce work.

D. W. LOGAN.

LIABILITY FOR ANIMALS. An Account of the Development and Present Law of Tortious Liability for Animals, Distress Damage Feasant and the Duty to Fence in Great Britain, Northern Ireland and the Common-law Dominions. By GLANVILLE L. WILLIAMS, LL.B., M.A., Ph.D. lxvi + 409 pp. Cambridge University Press. **25s.**

This is a work of immense importance. It is an amazing but undeniable fact that there has never been in this country a comprehensive treatise on the law relating to animals. The topic has of course always interested inquiring minds and has had its proper niche in works on Torts and Distress, but that was hardly good enough. The depopulation of the countryside and the invention of much more devastating implements of destruction may perhaps to some extent have been responsible, but whatever the reason the topic lay curiously neglected. Even the fact that the one branch which continued to show signs of fairly vigorous life, the scienter action by its very name conjured up memories of the days when pleadings were couched in Latin was not apparently sufficient to incite some historically minded enthusiast to delve into the original whys and wherefores.

Perhaps, on the whole this is as well. Of all topics the law relating to animals can only be treated adequately upon a solid foundation of historical research and it may be [illegible]

times, historical knowledge of the early phases of English law was sufficient to produce anything better than brilliant conjecture. If any work had been done, it would all, in the light of recent historical discoveries, have had to be done again. Now at last Dr. Glanville Williams has undertaken the task and no one could have carried it out more competently.

Of Dr. Williams's scholarship it would really be an impertinence for me to speak. The width of its range can be judged from the ample references he gives, not only to the Year Books and other early sources so far as England is concerned, but also to medieval Welsh, Irish, Scottish, Scandinavian and German principles. Even the code of Hammurabi, the Law of Moses and the legal systems of the Persians and Hindus, and of course the Greeks and Romans, find their place. For more modern ideas cases are cited from the reports in England, Scotland, Ireland, Canada, Australia, New Zealand, South Africa, Ceylon, India, Newfoundland and the United States, not to mention Burma, the Federated Malay States and the Falkland Islands. Nor is this a mere parade of unassimilated learning; his references are all pertinent and serve to illustrate once again the apparent universality of many of the more important primitive ideas.

The work consists of six parts. The first is devoted to that abstruse tangle known as distress damage feasant. The person who learns his law from nutshells must often have wondered whether there was any rhyme or reason in any of the rules, still more the innumerable exceptions, which any codification of the existing position produces. A person who has read his Williams will see, not perhaps that there is always a reason in the logical sense for a rule, but that it is the outcome of a consistent and intelligible development from the early conception which fixed the blame for damage, not on any individual by reason of being the owner of a chattel, but upon the offending chattel itself. Somewhat akin to this conception was the principle by which a gage might be taken from any individual who was found committing a wrong. Out of these two streams a current of self-help was formed which was too strong to be left quite unrestrained and accordingly a cross current set in when the Courts set out to discourage self-help in order to promote resort to litigious remedies. The whole story makes fascinating reading and every page brings new illumination on something that was formerly dark and dreary.

The second part of the work deals with the action of cattle trespass. Here the development was along the lines from thing-liability to personal liability. As was inevitable, the main difficulty was to find an appropriate form of action and this was not finally fixed until about 1353. The duty to fence follows appropriately in the third part and the discussion about prescription and agreement makes one realise how modern the whole subject really is. Nuisance is next considered, followed by the scienter action which takes one back again to conceptions based in origin upon a liability resting not upon a person, but upon a thing. The sixth part is devoted to Animals and the Highway with particular reference to cattle trespass, nuisance and high fence.

In all aspects it is the historical method which Dr. Williams follows, and there can be no doubt that one of the great merits of the book is the way in which it explains something to all appearances quite anomalous by reference to its historical development. It must not, however, be thought that the book is limited to matters of history. Dr. Williams explains and discusses shrewdly and judiciously all the cases which stand as bastions of the accepted rules and some of them do not really withstand the

criticisms which he makes. He also ventures on the dangerous path of suggesting what the law ought to be. It would be idle to pretend that in attacking what is standing or in planning for the future he will command universal acceptance of his views. There is surely no more reason why a person who wishes to keep a cat should be responsible if it kills a pigeon, than there is why a person who wishes to keep pigeons should take steps to prevent cats getting at them. People should be encouraged to keep animals which are useful as beasts of burden or as companions, and, in so far as they have propensities which are normal and therefore well known, it should be up to others to act appropriately in self-protection. Dr. Williams is, of course, on topics such as these, entitled to his views and more entitled than most people to express them, but others will, it is to be hoped, be found who prefer to favour their own ideas.

I cannot close this notice without an apology to Dr. Williams. His work merits a much deeper and more detailed examination than is herein contained, and called for such an examination a good deal earlier than the present time. I can only plead that circumstances over which Hitler alone had control have unfortunately made this impossible. I can, however, say that at any rate one practitioner has, by reading this book, acquired a knowledge of the present-day principles which he never had before and looks forward to using his Williams as an abiding source of reference and enlightenment in quieter days to come.

STEPHEN CHAPMAN

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